

The Juxtaposition of the Child as a Witness and a Victim: An
Analysis of Legal Policy Affecting Young Witnesses in Canada

by

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Abstract

The role of a witness presents the complex responsibility to convince a court of the alleged criminally deviant actions committed against them. My research analyzes how this role is further complicated when a child is a sole witness, often in child sexual abuse cases. I explore how their agency and competency is addressed within the policies that facilitate their testimonies and how it manifests in practice. Pervasive discourses of developmental psychology theorized about a child's capability continuously captures the validation and implementation of protection-driven policies that reflect their differed capacity as witnesses compared to adults. Through a critical discourse and narrative analysis, this research challenges these dominant ideologies that invade interpretations of child's agency as victims and their ensuing capability as witnesses to testify. By drawing on newer sociologies of childhood and critical victimology, this thesis elucidates the confounds of protection-based policy and its hindrances on child witnesses' agency.

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CHAPTER 1

Introduction

In adversarial criminal justice systems across the world, the role of witness testimony as a source of evidence to present the closest iteration of an event in question has been imperative to the outcome of justice. Historically, individuals who witnessed a crime were only considered a reliable witness if recognized as adults (Bala, Evans, & Bala, 2010). This recognition inevitably excluded children¹ and adolescents from participating in justice outcomes that may, at times, only involve them. A system was thus created without the intention of considering the unique experiences and status of an entire cohort across generations. Limited inclusion of child witnesses began to take form in 1893 through recognition in the *Canada Evidence Act*. However, within the last four decades, a robust awareness of the need to improve the conditions young witnesses were put under became apparent. Scholars and the arbiters of the criminal justice system recognized that the intimidating environment of the courtroom, the challenges of linguistic complexity used by counsels, and the overall adult-centric approach to the law were not suitable for young witnesses (Bala et al., 2010). Moreover, the discourses surrounding their credibility and reliability were increasingly validated, further solidifying their inclusion within the delivery of evidence through testifying (Jordan, 2014; McDonald, 2018; Westman, 2018). However, researchers also realized how these young witnesses were subject to further victimization in the courtroom, compounding the traumas they faced, which relegated them to the victim² status they unwillingly possessed (Bala, 1990).

¹ The terms ‘child,’ ‘children,’ ‘adolescent,’ ‘young,’ and ‘youth’ witnesses will be used interchangeably throughout this thesis. It encompasses all individuals who are under the age of 18 at the time of their victim and/or witness status. They are classified as a cohort that falls into the vulnerable witness category in legal spaces.

² This thesis applies McGarry & Walklate’s (2015) fluid conception a victim to be one who has suffered from an event predicated on power imbalances and the presence or absence of choice. For an in-depth discussion of what it means to be a victim, claiming victimhood, and the parameters of victimization through victimological lens, see McGarry & Walklate (2015). The contents of this ontological exploration will be revisited in Chapter 2.

In recent decades, there was an increasing awareness that crimes young people bore witness to was often the ones committed against them. Rising incidences and consciousness of abuse involving children, especially child sexual abuse (CSA), as sole witnesses, revealed that young individuals needed to be included in the justice process to provide evidence. As monumental as the shift was to acknowledge the need for their participation in significant events affecting children's lifeworlds, it became increasingly apparent that the criminal justice system in Canada, and several parts of the world for that matter, were never created to accommodate young witnesses (Westman, 2018). In adversarial justice systems like Canada's, the court recognizes the accused's fundamental right to a fair trial as per sections 7 and 11(d) of the *Charter of Rights and Freedoms* (Bala, 1990). Thus, it is obliged to ensure that cross-examinations can take place to challenge these witnesses' evidence (Myers, 2017). However, Canada also has a responsibility to the child upon ratifying the United Nations Convention on the Rights of the Child (UNCRC; UN General Assembly, 1989) since 1991. It requires participating states who agree to adhere to the norms set out to ensure child's best interests are recognized in several contexts, including legal spaces (Canadian Bar Association, n.d.; Noël, 2015). While the UNCRC is acknowledged in family law-related court processes where children are almost always involved (See Canadian Bar Association, n.d.), these considerations are not as heavily recognized in criminal proceedings when the child is a victim. As such, from the 1980s to the ongoing research now, legal professionals, social science academics, and advocacy groups alike have revealed the substantial gaps and barriers that influence and restrict the testimonies of young witnesses (Bala et al., 2010; Herbert & Bromfield, 2019; Herbert & Bromfield, 2020).

Along with other countries, Canada has introduced several reforms to accommodate these children and adolescents' unique position (Bala et al., 2010; Jordan, 2014). Formal provisions

such as testimonial aids were made available upon application to assist in delivering evidence to mitigate witnesses' anxieties related to testifying (McDonald, 2018). This ensures the most accurate depiction of the events is presented before any life-altering decisions are made in the pursuit of justice (Hurley, 2015; McDonald, 2018). While research has primarily contributed to this progress to guarantee that the testimony process for young witnesses is as tolerable as possible, there are still several gaps legal professionals, advocates and academics have highlighted that need to be addressed. Scholars who study childhood place an emphasis on how commonsense and developmental psychology applications to this field and several others are enmeshed in informing policy objectives (McNamee 2016; Moran-Ellis, 2013). Consequently, less attention is paid to alternative forms of analysis and researchers are accordingly urged to address this gap (Fellin & Callaghan, 2017; James, 2009).

Studies of testimonies of children and adolescents are largely positivist applications that determine the witness' credibility, reliability, and general ability to understand and respond to questions asked when examined by the prosecution and cross-examined by the defence (Evans & Lyon, 2012; Irvine et al., 2016; Szjoka et al., 2017). There is, however, some discord involving childhood theorists who call for a more diverse understanding that is not wholly positivist or causal (Fellin & Callaghan, 2017; McNamee, 2016; Moran-Ellis, 2013). Accordingly, while positivist findings are broadly applicable and provide general understandings of how a child can cope with the circumstances of being a witness, there are very few collectively qualitative and critical evaluations of the cross-examination process in particular, especially in Canada. Further, there are even fewer qualitative studies that inquire about the often-traumatic experiences a child and their caregivers endure when required to testify. These kinds of studies that yield meaningful lived experiences of children as witnesses have been done on a larger scale in New Zealand, for

example, but little research exists within the Canadian context which presents itself as a glaring issue (Hurley, 2015; Randell et al., 2017). Although these countries share similar adversarial justice systems and general principles, it is imperative to develop an enhanced body of Canadian data to reflect the realities of the court process experience for young witnesses.

Even more disparate among these studies are the conceptual understandings of what it means to be a child outside of the pervasive disciplines of developmental psychology about witness capability. My research, in particular, engages in the conceptual understandings of childhood informed by the newer study of childhood because there is a vast gap in the literature that fails to acknowledge the strengths of this perspective. I apply a critical lens regarding framing a young witnesses' vulnerability and naivety while testifying. My second chapter will digress into a deeper understanding of this perspective and how it informs my analysis. My research respects the challenges of young witnesses and their contributions to the outcomes of justice. While their lived experiences are valuable, it is not the goal to exploit these experiences for research but rather to mitigate the ongoing challenges they may face. The insights of young witnesses' experiences provide context and perspective to the literature's general understanding of the failures and misgivings of the criminal justice system. It is thus essential to emphasize individual experiences to ensure that no young witnesses are unnecessarily traumatized by identifying and probing weaknesses within the Canadian criminal justice system. This research addresses those gaps and presents evidence to understand if the reforms within Canadian statutes accommodate young witnesses. At the same time, I identify how these reforms materialize in court settings, evaluate how effective they are, and determine if they are enough.

Among these gaps, existing research has presented a glaring issue of the confusing nature of lawyers' questioning practices that defence counsels in particular continue to use while

examining children's evidence. Challenging language, questioning their credibility, and accusing young witnesses of being mistaken or dishonest are regular strategies defence counsels use according to existing studies that evaluate case transcripts (Denne et al., 2019; Irvine, et al., 2016; Plotnikof & Woolfson, 2011). Past researchers have gone as far as to say that these such strategies often place children at a disadvantage and may negatively impact their testimonies, and far worse, the outcomes of the decisions made about individual cases (Denne et al., 2019). While these studies are helpful to understand how often children are subject to complex and confusing questioning, there is an underlying layer of context and perspective from the position of the young victims' experiences that these statistics cannot account for: acknowledging children's agency, participatory rights, and voice³ (Fellin & Callaghan, 2017; Leonard, 2015; McNamee, 2016; Wall, 2010). My research intends to address the meaning of these concepts both contextually and in practice through the critical discourse and narrative analysis of a case transcript. As the first to do so in the Canadian context with such a perspective, this analysis, could catalyze future research, given its unique applications to literature on young witnesses from a qualitative point of view.

Sociological perspectives within childhood studies understand that "...the notion of children as fundamentally social beings becomes undermined and capability becomes defined as an individual trait rather than emerging from within situated contexts" (Leonard, 2015, p.130). This conceptualization of understanding a young witnesses' competency and agency throughout the testimonial process is not fully recognized in all aspects of court procedures and past research. Where my research will differ from these previous studies is its informed position from a critical victimological perspective coupled with concepts of childhood agency. It serves to go

³ These concepts will be elaborated further in the next chapter.

beyond quantitatively prevalent trends of lawyers' questioning in existing research involved in the examination process of evidence. Alternatively, it seeks to analyze the underlying discourses and assumptions associated with child witnesses required to testify. Similarly, critical victimology challenges typical positivist victimological theory and urges "...us to think critically about who, how, and under what conditions individuals and collectivities are recognized and responded to as victims" (Walklate & Spencer, 2016, p.192). While positivist victimology would highlight the prevalence of specific kinds of victims, critical victimology further analyzes the constructs of ontologies and epistemologies that define victims and their victimization. Another vital gap to note, which this research intends to address, within the critical victimological research itself is the specific discourse concerning young witnesses and how assumptions and understandings of their position as victims impact the overall justice process.

Children are entering one of many spaces not made for them. The courtroom enables a discourse around their victimhood which often relegates their value only to the testimony they must deliver. Researchers have cautioned legal practitioners about the dangers of re-victimizing these young witnesses in court settings (Zajac et al., 2012). Evaluations of the discourses used and how they affect these young witnesses are left out of strategies to improve their experiences in the courtroom, often replaced by general statistics analogous with presumptive ideologies that lack individual perspectives (Fellin & Callaghan, 2017). Discourses of children and victimhood that do exist often frame them as passive actors and may strip away their active agency and competency as a witness.

Furthermore, these discourses of passivity and vulnerability may challenge their visibility as meaning-making agents capable of effectively advocating on their behalf, which consequently overshadows and manipulates them when they endure questioning. This research aims to merge

childhood studies and critical victimology to determine how they can contribute to the literature's understanding of the children's needs from the criminal justice system when this very system requires them to testify. Moreover, applying these critical perspectives through exploring narrative constructions in legal settings will be the primary form of analysis in understanding the representation of child as a witness through discourse in the courtroom. Accordingly, this research intends to address the following questions: How do current Canadian legislative provisions for young witnesses' manifest in court settings? How do legal professionals' awareness of childhood and underlying assumptions influence the discourse or courtroom? Does the questioning process through the use of linguistically complex praxis during the cross-examination of young witnesses' evidence undermine their agency? Further, can the outcomes found in this analysis justify further reforms to existing legislation in Canada for young witnesses?

In this chapter and subsequent chapters, the following topics and ideas will be elucidated and explored. For the remainder of this introductory chapter, I begin by detailing the body of literature that focuses on the testimonial process and its accompanying challenges with child witnesses. Next, an overview of the existing accommodations afforded to child witnesses, evidence of their experiences testifying, and a discussion of the questioning process pre-trial and, most importantly, is explored during the trial. Finally, the findings and associated gaps identified in this literature preface the discussions developed in my second chapter relating to socio-historical views of childhood and critical victimology.

Accordingly, chapter two incorporates perspectives of scholars who conceive the child as a social agent, understandings of victimhood and similar ideologies put forward in critical victimology. A broad overview of the meaning of agency, victim status and witnessing to

provide the milieu of the child witness will serve to preface the discussion of how this thesis conceives the definition of a ‘child’. This discussion will predicate how this thesis views the child in a localized sense to juxtapose how romanticized ideologies restrain their agency and their consequent competency and autonomy. By evaluating the constraints of hierarchical influences of generation and the rigidity of childhood perceptions, this chapter addresses its derivatives and how it embeds itself in institutions such as the criminal justice system. In doing so, this chapter elucidates how child witnesses demonstrate their agency and capacity in different ways that divert from adult-centric notions of competency, credibility and reliability. These discussions amalgamate together to inform the analysis provided in chapter three by examining how these ideologies manifest in discourse.

I describe this analysis in the latter portions of this second chapter by discussing the methods and methodology applied in this thesis. First, a brief discussion of the ethical precautions taken in this thesis is necessary to discuss, given the seriousness of the subject matter. Next, I will discuss a justification of how and why a case study of a case transcript was used as my main unit of analysis to elucidate the relevance of this particular research method and the steps taken to analyze it. Furthermore, I clarify how this thesis applies a critical discourse analysis focussing on narrative development within formalized institutions. Finally, I divide my resulting analysis from this process into two chapters.

In the third chapter, this thesis grapples with the conventional characteristics of childhood and how it limits the view of the child witness as a social agent. Accordingly, I discuss themes of innocence, passivity, and suggestibility to elucidate how and why these views of children limit their existing capacity to deliver a compelling testimony. My analysis provides an evaluation of how counsels both assimilate and diverge in their nature of questioning. Additionally, I probe the

prevalence of appropriate and inappropriate questions and why they are flagged as such both in linguistic complexity and ideological formulations. Critical to this discussion is an evaluation of the consequences of these ideologies by shifting focus to how protection-based policies can counterintuitively prohibit the child witnesses from delivering an effective testimony explored in chapter four.

An evaluation of procedural constraints and their implications on child witnesses is the central theme explored in this chapter. As such, a critique of how well-intentioned approaches to address child witnesses can go awry leads to a broader discussion of how the criminal justice system fails to address the needs of these witnesses adequately. Additionally, I explore testimonial aids in other adversarial justice systems that have not yet been piloted in Canada to evaluate its possible additive value. Contrastingly, an exploration of arguments in favour and against transformative justice as an alternative to the current format of the justice system is crucial to this discussion given its victim-centred approach. Lastly, I will address a substantive overview of the conclusions to arguments made in this thesis and discuss the limitations of this thesis. Furthermore, I engage in a necessary debate about the possible future directions researchers could explore in this field to continue to better the experiences of child victims within (or without) the justice system.

In these chapters, I make the following arguments. This thesis primarily argues that the (un)intentional use of inappropriate questioning formulations by counsels and police officers and lack of appropriate oversight by the court is a manifestation of restrictive ideologies of childhood which impairs child witnesses' testimonies. Through the use of discourse imbued with romanticized assumptions of childhood while directly and indirectly engaging with child witnesses, this method reinforces the hierarchical influence of generation; that is, the adult-

centric power imbalance over a child. In so doing, this thesis argues these ideological constraints diminishes the social agent identity of the child who is forced to be witness and conform to the doxa of a courtroom. As a consequence of this romanticized view of the child witness, I argue that paternalistic protection-based testimonial aids used to protect their interests run the risk of counterintuitively limiting their ability to participate as coherent social agents.

Ultimately, this thesis argues that policy and practices that engage with children must align with the view that recognizes the unique capacities and their involuntary role as a witness. Furthermore, I argue for recognizing a need to mitigate discourse that relegates the child witness to characteristics inherent in romanticized ideologies. It damages their existing ability to articulate their experiences within their capabilities. In its current form, the justice system formalizes a gaslighting conduct practiced by its arbiters that entrenches adverse treatment of victims. As such, policies and practices must consider carefully transforming to adapt to a realistic conception of an effective child witness that encourages their full participation as social agents.

Review of the Literature

In the following sections, I will explore an evaluation of the existing literature concerning child witnesses in several contexts. Primarily, I discuss an overview of child sexual abuse and the nature of disclosure in Canada to provide context on this broad social issue. Next, this thesis will address an in-depth evaluation of the existing literature on testimonial aids and procedural adjustments for child witnesses in Canada. An examination of how the literature approaches concepts of child witness agency as well as the limited research available on the experiences of young witnesses will help demonstrate how this thesis will primarily depart from limiting views of the child. Next, I will examine concepts of competency and credibility of the child witness to

elucidate how developmental psychology and policy informs adjudicator conduct. Finally, I will probe the research-based evaluation of appropriate and inappropriate forms of questioning by counsels and police officers as well as judicial intervention to outline the boundaries of their categorization.

Child Sexual Abuse and Disclosure

Across different genres of literature, such as the socio-legal, psychological and policy perspectives, it is widely contended that archaic forms of treatment of witnesses in the criminal justice systems are inadequate to support young witnesses and retrieve accurate testimonies without informed adjustments. In Canada, an increased awareness of child sexual abuse (CSA) demarcated the necessity to include child witnesses in cases where they may be the sole witness involved. Unfortunately, there is minimal data concerning the prevalence of CSA in Canada due to a lack of existing databases containing publicly accessible information gathered mainly by independent researchers obtaining police reports. The dependency on this kind of data relies on the assumption that all instances of sexual abuse is reported. Aside from the alarming reality that these statistics are not accessible to estimate how prevalent an issue CSA in Canada is, the existing national data is less than optimal (Shields et al., 2019). What the limited and most recent literature suggests is that child sexual abuse prevalence has decreased between the years 1945 earlier to present. However, the only accessible data to map this information is from the General Social Survey (GSS), which only measures the population that is 15 and older who participate. This age limit excludes individuals below 15 and consequently restricts our understanding of CSA. Furthermore, it immensely limits the acknowledgement of the population of potential child sexual abuse victims who make up the majority of what is understood to be the age group of the

‘child’ category. Regardless of the accuracy of these statistics, the mere existence of CSA should warrant the justification to address how these cases are treated in the criminal justice system.

For documented cases via police reports, there is available data that summates the outcomes of the cases involving all sexual abuse victims, including children. The limited data reveals that cases involving child sexual abuse/assault charges are more likely to result in a conviction than those involving adult victims, according to data retrieved between 2009 and 2014 (Rotenberg, 2017, p.27). However, one of the most distressing themes was despite higher conviction rates, children who reported sexual assault cases are less likely to go to court than the same offences involving adults, especially those where the accused was related to the victim (pp.28-29). The urgency to understand the discrepancy of why these cases do not make it to court in Canada should be widely acknowledged and more heavily scrutinized. However, due to the constraints of resources, this thesis will only focus on cases of CSA that result in formalized judicial processes.

The muting of voices of young victims appears to be due to influences that are slowly being addressed in research concerning the prevalence and frequency of children’s disclosure. Although no studies are evaluating CSA disclosure in Canada in particular, existing research does shed light on its prevalence in other jurisdictions⁴. Azzopardi and colleagues (2019) found through their meta-analysis that age, gender and prior disclosure impact children’s likelihood to disclose abuse, if at all. Acknowledging and addressing the tendency of older children to disclose more often than younger children due to a higher level of awareness of sexual taboos, toxic and stoic masculinity that inhibits boys’ disclosure of abuse are ways to mend some of these gaps. Prior disclosure, which includes relaying orders of events when children are asked about their

⁴ This meta-analytic review evaluated studies in North America, Europe, and the Middle East.

abuse before forensic interviewing and the trial itself, in particular, is regarded as a positive outcome on their ability to recall details. Empowering the child's voice is similarly argued to be beneficial for children who are required to deliver their testimonies in court as they inevitably face challenges and discomfort (Randell et al., 2017). Facilitating these testimonies from young witnesses is crucial to the outcomes of justice. Decades of dedicated research have found positive ways to ensure children are equipped with the provisions to maintain their composure and retell their version of events as best as they can.

Child Testimonies and Testimonial Aids

In Canada, the criminal justice system recognizes the necessity to accommodate young witnesses due to dedicated social science research. Testimonial aids in Canada were created in the 1980s as court justices increasingly recognized research affirming a child witness had the capacity to provide evidence but required more support than most adults to deliver their testimonies. Aids were once afforded to child witnesses on a case-by-case basis until 2006, when a Supreme Court of Canada decision that upheld the constitutionality of the presumptive provision of aids in court proceedings upon application and confirmation from a judge (Bala et al., 2010). Amendments to the *Criminal Code* by Bill C-2 as well as the recent creation of the *Canadian Victims Bill of Rights* in 2015 were the legal vehicles that allowed for the presumptive provision of testimonial aids for young witnesses who are required to deliver evidence in court (Department of Justice, 2018; Hurley, 2015). After an application, a judge grants a witness access to these testimonial aids based on their needs to enhance the delivery of evidence currently constitutionally justified to supplement a young witnesses' testimony based on substantive research (Chong & Connolly, 2015; McDonald, 2018). These aids, as per the *Criminal Code*, currently include the exclusion of the public (s.486(1)), closed-circuit television

(CCTV) and protection screens (s.486.2), a support person (s.486.1), video-recorded evidence (s.715.1) and prohibiting a self-representing accused person from cross-examining the witness (s.486.3) (Bala et al., 2010; Westman, 2018). Nationally, the publicly available data generally suggests that video-recorded evidence is requested the most, followed by CCTV and protection screens (Chong & Connolly, 2015). Across Canada, data regarding the frequency and benefits of each testimonial aid varies upon the region. For example, observation studies found that in Edmonton the most common testimonial aid used in descending order were support persons, protection screens to shield the witness from the accused, publication bans, voice amplifiers⁵ and, CCTV (McDonald, 2018). In Toronto, on the other hand, the most common testimonial aids used were the exclusion of the public, followed by publication bans, voice amplifiers, support persons, witness screens and CCTV. The majority of these witnesses tend to describe these provisions' usefulness during their court experiences positively. The unprecedented steps made to include these testimonial aids for young witnesses are well worth celebrating; however, evidence suggests that challenging components of the examination process young witnesses endure are not mitigated despite these aids.

Credibility and Competency of a Young Witness

Researchers are determined to understand how child witnesses can cope with the examinations of the evidence they deliver in court. Although they formally qualify as a witness in the eyes of a courtroom, when they are being examined, credibility and competency remain prevalent in the line of questioning by counsels according to the literature. Children are most resistant to challenge-credibility questions asked by the defence when these questions focus on central details rather than peripheral details (Denne et al., 2019; Szjoka et al., 2017.) Central

⁵ There are a few testimonial aids which are not explicitly detailed in the *Criminal Code*, but are available upon request for young witnesses. This includes voice amplifiers, booster seats and support dogs (McDonald, 2018).

details refer to plot-relevant details that address the ‘who, what, where, when, and how’ of the alleged event. Peripheral questions contrastingly ask about irrelevant facts that are insignificant to the plot (e.g., emotions or thoughts felt during the event in question is taking place or descriptions of the time and place) (Andrews & Lamb, 2019). While young witnesses’ resistance to central details is a positive outcome of these studies as it suggests that they are equipped with the competency to stick to the story that they know, their malleability and vulnerability to challenges about peripheral details is a cause for concern (Irvine et al., 2016).

Researchers rightly suggest that the children’s lack of resistance to peripheral challenges can ultimately hurt their credibility as it presents inconsistencies in their testimonies. (Denne et al., 2019; Szjoka et al., 2017). The evidence from these studies demonstrates the glaring issue of children changing their original answers to satisfy the credibility challenge questions. Two main concerns emerge from this: (1) when an adult challenges a young witness about peripheral details they are unsure of, they are less likely to stick to their original answer which may be the most truthful one and incidentally, (2) harm their credibility further by changing their answer and unknowingly allow the possibility to include inconsistencies in their testimonies, only further diminishing their witness credibility. It is also important to note that across almost all of these studies, children across all ages were asked a similar proportion of credibility challenge questions, suggesting that a 6-year-old may be subject to the same questioning techniques of a 16-year-old which can also be considered a cause for concern (Andrews & Lamb, 2017). Further, research has also found the defence typically has a tendency of challenging children’s credibility rely on suggestibility, honesty and consistency questions (Connolly et al., 2014). Contrastingly, to counteract those claims the prosecutors tend to focus on plausibility.

In addressing these kinds of questions children face, several researchers have evaluated and created ways to prepare children before they are required to deliver evidence and avoid instances of damaging their credibility (Irvine et al., 2016; Hurley, 2015). Although the literature suggests its efficacy varies, as young witnesses find court preparation useful (Randell et al., 2017), the establishment of ground rules in the courtroom is not as heavily regarded as ground rules when preparing a child witness *before* their testimonies. This was evaluated by Brubacher and colleagues (2015) through a meta-analysis of literature examining the use of ground rules when children are preparing to be interviewed by a forensic interviewer. Interesting outcomes of this particular study found that children may employ these ground rules that have interchangeable meanings. For example, the 'I don't know' ground-rule, which was most common, may be used to replace of 'I don't understand your question' or it could be used as a way to encourage the interviewer to move on with their line of questioning. Thus according to this study, the efficacy of 'ground rules' can be helpful to a certain degree. However, as the examples described above, the possibility of using the 'ground rules' by young witnesses can get miscommunicated. Consequently, this may unintentionally exclude their ability to convey that they do indeed 'know'; they may have an issue with the question asked and may not be able to articulate this due to confusion or a misunderstanding.

When evaluating or arguing for extending the use of 'ground rules' in the courtroom, aside from precedence frequently cited from recognized Supreme Court of Canada (SCC) cases, acceptable and unacceptable discourses used to question children by counsels is highly unregulated. Authors who vigorously study this particular point of testimonies of children, especially cross-examination, discuss that there should be binding ground rules of specific questions that should not be asked of children in a similar way that 'rape shields' are used when

examining a rape victim's evidence (Plotnikoff & Woolfson, 2011). Plotnikoff and Woolfson (2011) specifically suggest that accusing a child of lying should be barred from the courtroom altogether. As I mentioned earlier, this is recognized as a precedent in past SCC cases that have acknowledged children's credibility and their understanding of 'promising' to tell the truth (See *R v W(R)* 1992 CanLII 56 (SCC); *R v B(G)* 1990 CanLII 7308 (CSC)).⁶ Interestingly, other authors have gone to evaluate if this accusation holds any merit at all. Is there a motive for young witnesses to fabricate their testimonies? Connolly, Coburn, and You (2014) found that jurors' beliefs in these cases already assume that children are inherently honest. If there was an influence to embellish, it was not derived by the child alone and thus did not diminish their credibility. Jurors alternately perceive this embellishment to be influenced by external factors such as a parent or guardian who told them to make false claims. In chapter three, suggestions of lying by the defence will be revisited in addition to similar perceptions of why or how children are thought to be influenced by external factors for this particular case study. The possibility of inappropriate questioning emphasizes the need to evaluate the discourse that goes on between victims and their interviewers in all aspects of the justice system, especially when there are no formal and enforceable regulations, aside from precedent, to promote safeguards to avoid these instances from the outset.

Court transcripts evaluated in Scotland by Szjoka and colleagues (2017) found that judicial intervention is inconsistent during credibility challenges that several authors find should be addressed. Andrews and Lamb (2019) found that a lack of judicial intervention in instances

⁶ In Canada, a child under 14 is required to promise to tell the truth (s.16.6) and are not required to demonstrate this understanding of telling the truth as a determinacy for the testimony to be admissible in court (s.16.7). For children who do testify in court, questions of their competency tend to align with credibility assessments. Frequently cited SCC cases are used to draw on a less ambiguous concept of competence and align it with credibility assessments. See *R v B(G)* 1990 CanLII 7308 (CSC) *R v W(R)* 1992 CanLII 56 (SCC) for these distinctions set out for young witnesses

where structurally complex language was used to question children was inconsistent. This presents a confusing paradigm of what can be understood as acceptable and unacceptable questioning practices as well as an imbalanced degree of intervention for some witnesses that won't have to answer challenging questions while some do. Further, in another study, Andrews, Lamb, and Lyon (2015b) found that the use of repeated questions was a contentious area to challenge. When attorneys, typically the prosecution, object to 'asked and answered', the judges in most cases overruled the objection. This is problematic due to findings that suggest when children are asked repeated questions, especially those that are linguistically complex or suggestive, it may have a detrimental impact on their accuracy and confidence in answering the questions adequately. These findings suggest that there is a justification to address these insufficient ways of inquiry which the judge of a courtroom should be aware of the problems associated with these modes of questioning and their impact on children's accuracy and delivery of testimony to maintain fairness. It is important to note, however, that judges recognize that there is a problem as well.

Interviews with legal professionals, among those who are judges in a study done by Westera and colleagues (2019) found that judges are less likely to intervene for the following three reasons: (1) unawareness of when to intervene, (2) not intervening out of the cautionary respect of not wanting the trial to be appealed causing further distress on the child witness, (3) intervening may not serve to benefit the child if some lawyers are simply unable to reword their question or simplify it any further (p.35). Understanding judges' unwillingness to intervene is valuable to a certain degree, however, it is essential to note that these perspectives are limiting. They lack the perspective of central figures who are impacted by this lack of intervention quite heavily. Grossly absent in the vast amount of literature available are the views

and experiences of the young witnesses themselves and how they perceive their credibility while testifying. Their agency and awareness of the position they are in and how their voice matters in the courtroom presents the opportunity to acknowledge this particular legal spaces' influence on their lifeworlds.

Agency and Experiences of Young Witnesses

Experiences from young witnesses themselves are scarce among research, especially in Canada. However, it is crucial to note that studies emphasizing children and adolescents' involvement as witnesses provides useful and meaningful insight and implications, stressing the need for more studies to enhance the literature's awareness of young witnesses' experiences in the justice system. Positivist approaches to child witness involvement in the justice system, which latter parts of this chapter explore, often fail to elaborate on the restrictions on a child's *agency* during the entire testimonial process. While a greater exploration of how agency can be mediated within the context of child witnesses in the second chapter, it is vital to address how this thesis defines agency and how their perspectives develop insight into this particular institutional structure. For this thesis, agency is understood as the recognition of the capacity an individual has to express their own ideas or experiences and accordingly make choices (James & James, 2012).

Consequently, in this view, children are seen as social agents who are presumed to have an awareness of their social status with astute perspectives surrounding their circumstances. Structures and relationships children engage within their lifeworlds mediate how children display their agency which manifests in different forms based on situated contexts (Moran-Ellis, 2013). Most importantly, viewing the child as a social agent, one who can draw on their agency, rejects

notions and assumptions about children that render them passive and powerless.⁷ Experiential research recognizes this capacity of child witnesses and accordingly amplifies their views and experiences of engaging with the testimonial process of the criminal justice system.

In New Zealand, a wide-scale study interviewing past young witnesses and their non-offending caregivers were vastly informative. Randell and colleagues (2017) found the two issues of pre-trial delay and cross-examination were the most commonly discussed in interviews among seven other concerns. For cross-examination, in particular, past young witnesses found that the confusing nature of questioning, the conduct of the defence lawyer and overwhelming feelings of not being believed or accusations of lying were salient in their discussion. Further, past witnesses described the manner of defence lawyers quite negatively, for example as ‘mean’, ‘rude’, ‘offensive’, and ‘a bully’ (p.364). The defence often left the victims feeling as though they were trying to deliberately confuse them while some also felt pressure to give quick answers out of fear they would answer for them. These tactics are one of the ways in which counsels contribute to the marginalization of young witnesses as social agents as they limit their opportunity to speak openly and thoughtfully about their traumas. Despite reports stating the judges intervened, which many of the participants appreciated, it was not always consistent. These insights into the questioning process during cross-examination are particularly revealing as it highlights saliently adverse outcomes for young witnesses. Trauma from the courtroom is an increasingly discerning finding that is not isolated to New Zealand alone.

The problem of the legal system causing young witnesses undue additional stress while testifying has been evaluated by researchers interested in understanding what ‘double victimization’ or ‘second victimization’ essentially means (Bala, 1990; Quas & Goodman, 2012).

⁷ Chapter 2 provides a deeper analysis of how romanticized ideologies of childhood were derived and how newer sociologies of childhood pivoted the paradigm to distinguish the child as competent social agents.

While studies emerge from different countries (e.g., New Zealand, England and Wales, and Scotland), it is crucial to heed these studies and their outcomes with great attention and consideration as it may be the case in our justice system as well. Increased anxiety due to the court procedure environment and the pressure of accurately answering questions were found among past research according to a comprehensive review of the lasting effects of being a child victim in the legal system by Quas and Goodman (2012). Referencing the dedicated work with past young witnesses themselves and other existing research, some of the lasting effects of testifying by young witnesses were largely negative. Mental health maladjustment such as “poorer self-concept, lower self-control, increased internalizing and externalizing symptoms, and greater risk of suicide attempts in testifiers relative to non-testifiers” (p.400), increased sexual problems and defensive avoidance are *some* of the consequences. Furthermore, some, not all, found the testifying experience to be harmful according to past research. These experiences of past young witnesses indicate to a consequence of ‘institutional gaslighting’ and should be taken seriously.

While this concept will be re-introduced and elucidated in the third chapter, a precautionary indicator of the underlying treatment of the criminal justice system to formally gaslight victims is important to the discussions levied in this thesis. The term gaslighting refers to strategies used by social actors of a higher power to mentally manipulate and undermine the experiences of the victims they cause harm to and effectively shift the blame back onto the victim (Sweet, 2019). Sweet (2019) further argues that gaslighting can be extended as a social phenomenon which uses stereotypes of victims reflecting their social inequalities as a way to manipulate their reality. While the term ‘institutional gaslighting’ is still in its infancy, it has yet to be extended to how it manifests in the conduct of the courtroom and its consequential

influences on victims.⁸ Institutional gaslighting is particularly insidious because of the legitimacy structures such as the justice system carry. The particular danger of this form of gaslighting within the courtroom falls on the integrity and reputation that comes along with final judgements. Whether or not the conclusions made by the court are the truest form of fact, the narrative and its stereotypical assumptions serve to reify the erroneous statuses of the victims. This problematic form of gaslighting not only directly effects the victim who is told that their experiences are not what the court views as a real experience, but indirectly creates a negative perception over certain victims as a whole who are denied their truth. Furthermore, as the aforementioned experience of past young witnesses demonstrate, the damage of this form of gaslighting lasts long after the final judgement. Increasingly troubling is the lack of accountability that the justice system takes for the lasting effects of ‘double victimization’ they contribute to. For some scholars, this has encouraged increased research to develop an understanding of how our justice system can accommodate them better.

For Canada, although on a smaller scale, limited existing research provides insights into the experiences of youth highlighting the existing gaps the justice system has not been able to account for. In particular, their experiences in court and the provisions made available to them still do not seem to mitigate the limiting factors resulting from the practices of the adjudicators. For example, Hurley (2015) completed a small-scale study of young witnesses’ experiences with testimonial aids including CCTV, protection screens and support persons in Ontario’s West Region. The majority of the witnesses (~75%) used CCTV and a court-approved support person which allows them to testify from a separate room with the Crown and the defence counsel

⁸ In Chapter 3, I return back to this phenomenon while addressing alternative ways this has briefly been ascribed to alternative institutions in past literature. See Ahern (2018) for a discussion of institutional betrayal in nursing fields and Smith & Freyd (2014) for a discussion of institutional betrayal and sexual assault victims on University campuses.

present while the witness provides their testimonies in real-time. Other youth opted to give an in-court testimony due to lack of equipment but chose to use a screen to block their view from seeing the accused. While the majority of the participants felt safe, because they were not forced to face their accused, they still felt troubled by the cross-examination. Most of the young participants thought that they could not articulate or describe their answers in detail they wanted to while being questioned by the defence. Others reported that they were confused when trying to answer questions by the defence counsels, and one reported feeling they were so distressed that they ran from the room and did not return to complete their testimony. These kinds of nuances made available by anecdotal evidence allow for a revelation of the problems young witnesses face while being forced to testify and the particular stressors that emerge from cross-examination. Questioning practices at all levels of the criminal justice system in Canada when young vulnerable witnesses are involved have been evaluated and adjusted to address some of these issues. However, existing literature does suggest that variability among kinds of legal professionals creates a disjointed process that remains problematic.

Child protection services which include but are not limited to Child and Youth Advocacy Centres (CYAC), victim services, Crown prosecutors as well as police officers have taken the necessary measures to adapt to the appropriate ways to discuss the event in question with young witnesses on their own accord to buffer the challenges witnesses tend to face in court. While there are no national thresholds or regulations in place to enable a standard of questioning practices, dedicated research to evaluate such organizations have yielded revealing information about how adjustments to the questioning process matter. There is a large amount of wide-scale research in Canada to support accommodating measures to ensure best practice interviewing measures of young witnesses which tend to vary based on region (Luther et al., 2014; McDonald,

2018; Westman, 2018). While these measures are considered beneficial for young witnesses, outcomes of this research suggest these measures significantly vary upon region resulting in a diverse outcome of questioning. The interrogation and questioning process of young witnesses is a largely unregulated aspect of the justice system and there is existing research to demonstrate its limits and why formal regulation should be considered.

In 2012, an Indigenous 17-year-old girl was interrogated by an RCMP officer due to her report of sexual assault (Jackson, 2019). The contents of the interrogation were recorded and later released in 2019 to the public which was immediately confronted by immense scrutiny and outrage. The questioning practices used by the particular officer were egregious in a manner in which *no* victim should endure, especially an individual under 18.⁹ Its revelation re-inspired the ongoing pressure on organizations, including police services to scrutinize what their training interrogation measures consist of. Brubacher and colleagues (2018) gathered their data through a Canada-wide online survey inquiring about legal professionals' experiences with interview training for young witnesses. Respondents were able to choose to identify who they worked for, their regional area in Canada (by province) and a series of open-ended questions about interviewing practices such as their opinion about their training, its length, who provided the training, what they found valuable, and what they wish they would see in the interviewing training that is currently not included. The results revealed similarities and differences among child protection workers and the police.

⁹ National outcry emerged when the officer in question had asked the victim: "Were you at all turned on?", and further probed with the question, "Physically at all, you weren't responsive to his advances, even maybe subconsciously?" (Jackson, 2019). The officer has since been publicly condemned for this kind of inappropriate interrogative behaviour.

The training was typically conducted once, for an average length of a week, and most reported that they received no follow-up training (p.47). Child protection respondents were more likely to report challenges associated with training and organizational issues whereas police were troubled with barriers such as building rapport and legal applications of their interview. The latter were concerned if their video-recorded evidence is used in court, they worried about how useful it would be or if it would be scrutinized for its inadequacy or not used at all. Some of the desires the respondents had included increased training, alternative guidelines for child interviewing, refresher follow-up training, learning about the child's special circumstances, dealing with inconsistencies in a child's story and working with children of diverse abilities (p.51). Lastly, one difference of opinions between child protection workers and police was when they were questioning a child in the same room, they expressed frustration in cases where the police officer may take over the interview and they may disagree with their approach. (p.53). Since their goals vary, their interviewing protocols come off as disjointed. This research parallels insights found with the problems highlighted earlier about the young 17-year-old girl who was interrogated by the RCMP officer as it exposes the possible variability of appropriate forms of questioning by trained professionals. Despite mandatory training for services who work with young witnesses, the possibility of incongruent interviewer questioning persists among all components of the witness experience for young individuals. This gap in questioning practices has led researchers to consider alternative mitigating factors to alleviate the variability of interrogation measures and ensure consistency and fairness at all levels of the criminal justice process.

Instances of inappropriate questioning as it relates to lawyers, in particular, are not scrutinized in the public media as heavily as the RCMP officer example. However, both Crown

and defence counsels engage in inappropriate questioning in general contexts in Canada and can impact the outcomes of trials (Hurley, 2015; Taddese, 2016). Incidences of improper questioning techniques used towards young witnesses and victims are less similarly publicized in media contexts as the RCMP interview incident which may often deflect the urgency to address these issues. However, a large body of research re-ignites the importance to address this glaring issue which identifies the nuances of the challenging questioning young witnesses are subjected to which may not be as obvious as the questions asked by the RCMP officer (Henderson et al., 2018; Henderson & Lamb, 2018). There are varying degrees of questions that are recognized as inappropriate within the research that may not always traverse academia and translate into court procedures in Canadian jurisdictions. The attitudes of counsels and the judiciary and their relative awareness of the deleterious effects of inappropriate questioning practices are unknown in Canada. However, it is worth examining these kinds of questioning practices that are deemed inappropriate by existing research, how the Canadian criminal justice system accounts for them, and determine whether these boundaries if they do exist, are enforced.

Lawyers' Questioning Practices

As a common law country, Canada's justice system is established in an adversarial format. It is:

“A system of justice premised on each party having an obligation to present evidence and arguments to support its position, though there are special obligations of fairness for the Crown prosecutor. A hallmark of Canada's adversarial system is that the judge, a neutral figure, remains relatively passive during a trial” (Bala & Anand, 2013, pp.741-742).

Central components to the adversarial process is the presentation of evidence combined with the examination and cross-examination by both the Crown and defence respectively, especially in cases where children are the only witness to a crime. While the ability to cross-examine the, oftentimes only, evidence of a child's testimony addresses the accused fundamental rights afforded to them by the *Charter of Rights and Freedoms*, an ongoing collection of research has highlighted the harmful effects of examination on the child contravening certain principles and norms set out in the UNCRC ratified by Canada, namely articles 12 and 39 (Bala, 1990; Quas et al., 2005; Quas & Goodman, 2012). The ability for a child to have a right to participate in matters which concern them, including legal spaces describes the main goals of Article 12. The responsibility of the governing state to promote measures of psychological and physical recovery in environments which "...fosters health, self-respect and dignity of the child" addresses the goals of Article 39 (UN General Assembly, 1989, p.11). Enabling young witnesses to provide their testimonies begins to satisfy the goals of Article 12, however, the water becomes murky when researchers expose the hardships and challenges young witnesses face when testifying that may limit their ability to participate in the court process in a manner that undermines their unique capacities. Furthermore, as was discussed earlier concerning the negative mental health outcomes as a result of testifying, effectively preventing Article 39 to be actualized in practice, the nature of questioning both kinds of counsels must be addressed as a consequence. It is unacceptable to comprehensively enable child participation in matters that affect them in legal spaces while simultaneously harming or undermining their agency and rights by inappropriately challenging their testimonies.

Years of dedicated research to the linguistic complexities and components of 'lawyerese' have demonstrated a unique barrier for young witnesses who are required to testify. The

outcomes of these studies have discovered the boundaries of appropriate and inappropriate forms of questioning styles used by counsels in practice as it produces answers from young witnesses that may be a detriment to their credibility. As discussed earlier, Andrews and Lamb (2019) found that children were more likely to contradict themselves when asked about peripheral details than central ones upon evaluating case transcripts. It was also interestingly found that age played no significant role in the child's ability to answer questions or fare better regarding the kind of lawyer answering the questions. Andrews and Lamb (2017) evaluated how the use of structurally complex language used via lawyers' questioning impacts the responses of young witnesses in Scotland. Consistent with past research, complex questions such as suggestive questions presented the most significant impact on children's responses. Their responses were uncertain, contradicting at times, or would generally encourage less of a response. Children's tendency to be unresponsive was associated with higher linguistic complexity levels in questions that do not effectively aid the testimonial process. An important trend to note from this particular study was that the level of responsiveness to complex questions to any degree should be a cause for concern. Children responding to questions that they likely do not understand presents the possibility of detrimental effects on their testimony, the strength of their responses and their overall credibility if they provide inconsistent or self-contradicting answers.

. Researchers have probed these effects by contrasting questioning techniques of prosecutors and defence counsels to determine the extent of its influence on a child witness' testimony. Andrews, Lamb, and Lyon (2015a) evaluated these differences by measuring children's responsiveness and consistency to questions posed by both counsels. Upon analyzing case transcripts, they found that the defence lawyers were most likely to yield less of a response from the young witnesses. When they were able to elicit a response, it was often self-

contradicting statements. It is important to note that although prosecutors used more invitations, directive and option posing prompts, prosecutors still used more closed-ended than open-ended prompts, option-posing prompts and few initiations¹⁰. While this study is limited in its generalization since it evaluated Los Angeles County transcripts between 1997 and 2001, the implications for the outcomes of children's testimonies remain compelling. These studies reveal a case for restricting certain kinds of questions counsels *should* be allowed to use when engaging with young witnesses.

The argument for “censorship” or questioning styles that should be considered off-limits for young witnesses due to the possibility of their negative short and long-term mental health effects has been met with mixed perspectives. As mentioned earlier, Plotnikoff and Woolfson (2011) are amongst the researchers who promote the exclusion of accusing young witnesses from lying as it is understood among the research community that these kinds of accusations are associated with adverse outcomes toward the testimonies of the young witnesses (Quas & Goodman, 2012; Randell et al., 2017). Restrictions on certain kinds of language and questioning techniques have been introduced to lawyers in the past, one of which is recognized as ‘rape shields’ in the United States and Canada (McNabb & Baker, 2021; Myers, 2017). The courts recognized the inappropriate conduct of lawyers cross-examining sexual assault by scrutinizing their degree of chastity and formally introduced ‘rape shields’ to protect these victims from those kinds of skeptical questions. For young witnesses, as discussed earlier, some negative salient experiences of being cross-examined by defence lawyers in particular were a result of accusations of lying, disbelief, or the creation of an alternative story (Hurley, 2015; Randell et al., 2017). For some authors, however, the ‘temporary discomfort’ of cross-examinations for

¹⁰ A comprehensive overview of appropriate and inappropriate forms of questions and formulations can be located in Appendix A of this thesis.

witnesses is a necessary hurdle to ensure the justice system's due diligence by scrutinizing evidence.

Myers (2017) provides a scathing defence for the way cross-examinations exist today and why justice systems should not exempt young witnesses from this part of the court procedure. He argues that cross-examinations are not intended to elicit as much of the truth about the event as possible from the child similar to a forensic interviewer or a prosecutor. Instead, he argues the defence must apply the same 'zealous' manner a prosecutor would apply to demonstrate the most 'incriminating' version of events to a young witness. While he digresses to note that inappropriate questions should be taken off the table, something with which we agree, he does not elaborate on what this means. He further states that the defence should also *not* limit their questioning to best interview practices. He even goes as far as to say, "I argue that, if cross-examination sometimes undermines the search for the truth, by distorting a child's truthful testimony, the benefits of cross-examination outweigh the harm" (p.474). This perspective of defending cross-examinations by justifying 'harm' against a young witness is extremely disconcerting and problematic.

Diminishing the lasting effects of being forced into the courtroom as a young *witness* should not be taken lightly. They should not be a 'tool' used to ensure the carrying out of 'justice' at the expense of their well-being. Furthermore, justifying 'temporary' harm during a cross-examination of a young person since it 'may not have lasting effects' diminishes the lived reality of the witness at the time and the undue stress associated with these tactics. In other words, why should persistent long-term effects leading into adulthood serve as the threshold to justify when challenging and truth-bending kinds of questions go too far? Harms of *any* kinds should be removed from the examination and cross-examination process regardless of the age of

those who encounter it and how long those effects may last. Myers cites research with decades old data to conclude the stressful impact of cross-examination for children are inconclusive. The more recent research discussed in this thesis suggests otherwise.

Further, why do cross-examinations children encounter *need* to be uniformly bad for it to warrant adjustments or general change to this portion of the court process when young witnesses are involved? These individuals are not statistics and are not only to be perceived as data from a study or a means to obtain evidence. They are young human beings with possible mental, emotional, and physical damage from a traumatic event (or events) who deserve to be treated with dignity and respect. Undermining their abilities to testify, capitalizing on their confusion and emphasizing mistakes as a result of their unique social position is wrong and simply cannot be justified. Other scholars do find these practices to be faulty and accordingly have evaluated the conduct of defence lawyers specifically.

Defence lawyers have an obligation to defend the accused from the charges laid against them resulting from claims made by witnesses who have wronged them in CSA cases. Zajac and colleagues (2017) evaluated the evolution of defence lawyers' use of questioning styles from two time periods: historical (the 1950s) and contemporary (2011-2015). They found open-ended questions to decrease over time while the proportion of closed-ended and leading questions remained steady. Interestingly, the proportion of complex language and complex sense questions were found to increase with both age and time periods. These findings heavily reflect contemporary studies on the kinds of questions defence lawyers continue to use when cross-examining young witnesses. Andrews and Lamb (2019) found that the type of counsel does predict the kinds of questions when examining and cross-examining a young witness. Their results demonstrate that children are less responsive to defence lawyers compared to prosecutors.

Additionally, they found that defence lawyers were able to elicit more self-contradictions from children. Andrews and Lamb (2017) similarly discovered a tendency of defence lawyers to use the most structurally complex questions, namely suggestive questions. Evans and Lyon (2012) found that the defence attorneys asked the most difficult kinds of questions based on the categories highlighted by the authors (e.g., definition meaning questions, consequence morality questions, and prior occurrence morality questions) (p.13). Due to the existing nature of cross-examinations, defence counsels resort to such questioning to achieve best results for the defendant in creating the possibility of an alternate truth (Myers, 2017). However, it is essential to highlight that most of these studies emphasize that some prosecutors and judges asked challenging kinds of questions. These researchers repeat the chorus suggesting a need for overall adjustment on the ongoing and frequently updated awareness of categories of questions that do not yield proper answers from the young witnesses and could be by using alternative question types.

Currently, there are methods applied within organizations (e.g., some police organizations depending on the autonomy of respective jurisdictions, CYACs and other affiliated child victim services) that apply certain best-practice interviewing methods before young witnesses get to trial that is worth understanding as it can promote the best possible disclosure. NICHD protocol involves the encouragement of less suggestive¹¹ questions and more directive¹² questions in its place which, according to research, yields more accurate and productive responses from witnesses (Gagnon & Cyr, 2017). Open-ended questions are promoted as the best practice for interviewing young witnesses to promote free recall and only resort to closed and

¹¹ Suggestive questions include the use of questions or propositions that suggest the actions or motives of the witness: e.g., “Are you lying?”.

¹² Directive questions involve the use of questions beginning with WH-: e.g., “Who was on the bed with you that day?”. (See Appendix A for an comprehensive list of all question types).

open-ended directive questions rather than time segment invitations. An emphasis on specific forms of questioning and rapport building is the foundation of this method to encourage disclosure from young victims. Several studies evaluate the efficacy and benefits of this questioning approach to determine its merit, and more importantly, its influence on young victims' ease of re-telling the traumatic event(s) they witness.

Benia and colleagues (2015) conducted a meta-analysis of field studies to evaluate the National Institute for Child Health and Human Development Investigative Interview Protocol (NICHD) use in forensic interviews with young witnesses developed by Orbach, Herskowitz, Lamb, Esplin and Horowitz in 2000. Their review found NICHD protocols effective in increasing open-ended questions and eliciting an increased number of details. They also found it to effectively decrease option-posing and suggestive questions/prompts compared to standard interviews that did not use NICHD guidelines. Gagnon and Cyr (2017) found that preschool-age children, in particular, can provide informative responses about their CSA when asked in an appropriate manner adhering to NICHD guidelines. Katz and Barnett (2018) found that the children's reliance on a similar story to their initial testimony because of the interviewers within the study adhering to the NICHD protocol guidelines. These findings further suggest a benefit to recalling aspects of their abuse and preventing incidences of damaging their credibility. Finally, Azzopardi and colleagues (2018) recommend using the NICHD protocol to combat reluctant disclosure of young victims after completing a meta-analysis of CSA disclosure prevalence. However, they note that although most children understand the severity of their position, the authors emphasize the need for developmentally appropriate and sensitive questions. They caution against applying a uniform questioning strategy scheme for young children since even within this age group, variance does indeed exist. These kinds of adjustments made by legal

professionals required to interact and communicate effectively with young witnesses are relevant for counsels in a similar position.

Other countries with similar adversarial justice systems have introduced additional reforms to the relevant legal vehicles to continue to accommodate young witnesses during their testimony suggesting that there is potential for Canadian legislation also. Henderson and colleagues (2018) evaluated the efficacy of Section 28 reform within the Youth Justice and Criminal Evidence Act in Scotland by comparing transcripts before and after the reform. The new section introduced Ground Rules Hearings (GRHs) in which the judges, counsels and intermediaries¹³ (linguistic aids for young witnesses), if necessary, before the trial commences discuss strategies for the best ways to accommodate each young witness to account for their unique developmental abilities. They found that the question complexity of defence lawyers lessened significantly whereby less multiple negatives, fewer words and clauses per utterance and fewer questions about temporal and numeric attributes compared to the defence lawyers without the Section 28 adjustment. These findings promote promise for reform possibilities when addressing lawyers' questioning practices by *reducing* the proportion of complex questions by both the prosecution and the defence but not effectively *eliminating* challenging questions for young witnesses.

Henderson and Lamb (2018) concur with this conclusion with their finding of the kinds of complex questions that decreased due to Section 28 reform. While the riskiest types of questions, such as suggestive questions, are a challenge for young witnesses (Andrews & Lamb, 2017; Klemfuss et al., 2014) due to the nature of the questions, they found that counsels used other less obvious risky questions were used in its place. Namely, option-posing questions since

¹³ This testimonial aid will be revisited in Chapter 4 due to its unique third-party position in the adversarial criminal justice process that involves young witnesses.

they are understood to limit the productivity of the response and elicit a more significant amount of incorrect details. Another issue they highlighted was the likelihood of younger children (6 to 12 year-olds) to comply with the defence more than the older children (13 to 15 years-olds) which is problematic because this complicity may inhibit an accurate re-telling of the events. The outcomes of these studies evaluating the efficacy of reform in adversarial justice systems similar to Canada demonstrate a conceivable option for legislative reform when child witnesses are involved. This thesis seeks to investigate if there are grounds for a similar approach to help accommodate young witnesses achieve the best outcome of recalling events in a way that does not limit their agency, ability to testify, and awareness of the entire examination of their evidence.

Interestingly, there is limited research in Canada discerning variability of questions asked by the prosecution and the defence which emphasizes the need to understand if there are grounds for concern. The literature emphasizes a need to understand if inappropriate language use is embedded in the nature of questioning when counsels examine young witnesses. Nuances are sought to be detected to address outliers within covertly inappropriate questions when engaging with young witnesses. I argue that the threshold for inappropriate questioning should be very low. One case study with these instances should justify a re-evaluation of how *all* lawyers question a child and whether or not there is a reasonable need to adjust policy to ensure the justice system protects the interests of the child victim. There is a need to address the possibility of lawyers' questioning perpetuating and exploiting the vulnerabilities of these groups of individuals to obtain a specific narrative (Randell et al., 2017). Young victims deserve to have their voice heard within legal spaces and their opportunity to do so should not be co-opted or sidelined by undermining their ability to answer questions or using their unique capacity against

them. For some victims, the opportunity to have their day and court and tell their story is empowering (Quas & Goodman, 2012; Randell et al., 2017). For others, they recognize the duties associated with the role of being a witness and will do what it takes to get it over with. Each child should receive the court's due diligence in any scenario to ensure they exceedingly limit the anxieties these witnesses face in the courtroom.

The following steps of this thesis involve establishing the theories and methodologies applied to evaluate the questioning practices of counsels within a Canadian context through a case study. As described earlier, this thesis will draw from critical victimology and the new sociology of childhood as its foundation of theory for analysis. Additionally, critical discourse analysis focusing on narrative development will be justified and applied in evaluating a court transcript involving a young witness in Canada. A discussion of how I thoroughly analyze this particular case is explained in more depth will follow in the next chapter.

CHAPTER TWO

Theory

This subsequent discussion will lay out a conceptual framework of how depictions of a child and victims are informed and how it dictates their varying levels of agency and competency as witnesses within the justice system. Considerations of the construction of the child, from a childhood studies perspective while acknowledging how contributions from developmental psychology can be useful and limiting will be addressed. I will discuss integrating understandings of critical victimology and how childhood studies can inform and work within this perspective to augment the dialogue surrounding child witnesses. Following this, I describe how these concepts inform my analysis of a case transcript from an Ontario criminal court proceeding. This analysis aims to deconstruct the courtroom relating to the discourses of children's agency, competency, and autonomy as witnesses and explore how these narratives are informed and used in practice.

The Formula for a Social Agent: Defining Agency and the Role of the Witness

This thesis engages with agency informed primarily by newer sociologies of childhood to understand their delegated role as witnesses in trial proceedings for social harms committed against them. It is essential to distinguish what it means to have agency or to be a social agent and how it converges with the role of a witness. It largely predicates how I perceive children to engage with their social worlds, in this case, trial proceedings. In the simplest of terms, I understand agency as the ability of an individual to actively engage and transform the social worlds around them (James & James, 2012; James, Jenks & Prout, 1998; Qvortrup, 1994). Agency is understood not as a fixed entity but rather a resource any individual can draw on mediated by the confluences of social structures and generational influence (Moran-Ellis, 2013).

Children are accordingly understood to accept, subvert, negotiate or even resist their circumstances despite the imbalance of power exerted over them as a result of generational hierarchy (Leonard, 2015). For example, to a certain degree, one could argue recognizing children's agency has improved in the sense that they are deemed capable of being witnesses to deliver a testimony in court proceedings. Their agency is recognized, and they are accordingly provided a platform to speak to their experiences of victimhood with binding consequences for the accused. However, as this thesis will elucidate over the next few chapters, children's agency particularly due to their social status relative to adults, is restricted by the kinds of questions they are asked. Additionally, it explains the kinds of assumptions that are encroached on their identity which effectively limit their status as social agents. Furthermore, this thesis contemplates the relationship between child identity and victim status concerning their claims to it in addition to their presumed ability to document the events they witnessed.

The limits of agency are censored in the politics of victimhood, what it means to be a victim and who is granted the status of the victim. These limitations are especially prevalent within formal institutions such as the criminal justice system. When it comes to the abilities of a victim and their analogous role as a witness who testifies, McGarry and Walklate (2015) describe how memory and trauma become a reflection of power, politics, and interests, rather than the focus of the truths told by the victims themselves. Drawing on different case studies, they provide a holistic ontology of trauma, testimony, and justice from a victimological standpoint to critique the problematic ideologies institutions formalize. The concept of testimony and how it intersects with justice is particularly relevant to this thesis. It flags the contentious experiences that emerge when ostensibly centring the victim's 'voice' in trial proceedings. Similar to agency as it relates to children, testimony and the outcomes of justice become

intrinsically linked to a legitimated exemplar of victimhood that is unrepresentative of the act of witnessing and victimization. Therefore, it is necessary to describe why this thesis approaches and understands witnessing and the impact of the event told by the victims themselves as crucial and how speaking to these experiences can be co-opted and re-structured by the arbiters of the criminal 'justice' system.

For Agamben (2009), being a witness is problematized when it is invariably linked to the justice process, or the final judgement. He suggests it to be the punishment in itself regardless of whether you are the victim or the one on trial. By tracing the etymology of witnessing, which is the Greek origin of 'to remember', Agamben (2009) argues that 'true witnesses' (p.34) are not the survivors, in the context of Auschwitz, but rather those who were unable to survive. A consequent lacuna emerges between witness and testimony as the lost stories of those who cannot tell their stories are gone. Particularly relevant to this thesis is Agamben's description of the lacuna language carries in testimony and its efficacy to bear witness with the example of Hurbinek. A young child Levi (1986) encounters in his writings, given the alias Hurbinek, who could only utter one inconclusive word had borne witness to harms that are lost due to his death. In critiquing the innate impossibility to completely enmesh the witness to explicate a full testimony, Agamben writes, "[i]t is thus necessary that the impossibility of bearing witness, the 'lacuna' that constitutes human language, collapses, giving way to a different impossibility of bearing witness – that which does not have language" (p.39). Similar to the discussion levied within the latter portions of this chapter and the remainder of this thesis, Agamben critiques and argues that the capacity language has to translate what one has borne witness to is an erasure of the lived reality of those who could not survive. He argues that this augments the inevitable discrepancy the testimony has in recollecting the actual event. For Hurbinek, his story can only

be a reflection of those who speak to his experience in his absence. Agamben's suggestion of significance in silence and non-language speaks volumes for this thesis. Our justice system contrastingly necessitates 'coherent' language that validates the existence of an event. So much so that it acquires a befuddling process to perplex those who try to articulate these experiences. The schematics of this dissonance remains integral to my focus on the individual victim and the harmful event they endured.

There is collective tension from scholars of disciplines with different motivations in their critiques of how institutions address victimization. Scholars argue that the abstraction of understanding the harmful event that victimizes an individual erases the unique story of each victim that comes to grips with their trauma and how they articulate this trauma in varied ways (Agamben, 2009; McGarry & Walklate, 2015; Spencer, 2010). Spencer (2010) describes levels of bearing witness which originate at the event of victimization. Those present at that level are in a position to no longer bear witness to that event alone. Once they articulate their story to an interviewer, the remnants of the event can carry on from those who survived it. Similar to Agamben (2009), Spencer (2010) emphasizes that "[b]ecause there is loss in the act of remembering, testifying and inscribing (writing) an event of the past, the work of the researcher is always a work of mourning" (p.49). The researcher's acquisition of details allows them to bear witness to the event, despite the full recollection of details not being in its totality, as there will inevitably be elements of the event that are permanently lost. This informs why the researchers' goals, or in this case interrogators' goals, should be to mindfully position themselves while engaging with events of victimization and its survivors to comprehend the past. This thesis demonstrates how, despite the lacuna of testimony and the event, the justice process subsumes a flawed format of witnessing to access the 'truth' to pursue 'justice'. More specifically, as the

following chapters describe, methods of questioning, assumptions of childhood, and follies of protective-based aids amalgamate to morph the story told by the child witness that subscribes to a formula that is resistant to appropriately centring the victim and their version of the events.

This thesis will first provide a broader reflection of how children are perceived culturally. These perceptions preface why their ‘innate’ identity that is presumed to be ubiquitous endangers their claims to victim status, their position as social agents and their consequent epistemic authority in the courtroom.

A Child Amongst Childhood(s)

Navigating the unique positionality of children as victims in the justice system presents an issue when evaluating the competing discourses used in childhood studies’ understandings of children as social agents compared to pervasive developmental psychology discourses which tend to inform policy relating to their testimonial obligations and ‘capacity’. To address these origins of understanding what a ‘child’ is within contexts such as the justice system, childhood studies scholars emphasize the need to acknowledge the historical, cultural, and contextual influences communicated through institutions, social relationships, and their everyday lives to contextualize this meaning (Qvortrup, 2009). Scholars explore the meaning of ‘childhood’ itself through structural, generational, and geographical perspectives to understand the influences which manifest as a result of historical and temporal, cultural, relational, global and local factors dismantling a totalizing definition of what this category means (Holloway & Valentine, 2000; Leonard, 2015; McNamee, 2016; Qvortrup, 2009). Accordingly, for this thesis, a recognition of a multiplicity of childhood (from heretofore, ‘childhoods’¹⁴) described by childhood theorists and

¹⁴ I refer to childhoods as plural to recognize that there is not one universal childhood, but rather a diverse set of childhoods that allows for an understanding of multiplicities and not all childhoods are one in the same. Some scholars do address why they use ‘childhood’ as their unit of analysis described by Qvortrup (1994).

scholars will be applied to deconstruct global meanings of *childhood* to identify the diverse realities of *childhoods* and those who represent this group as social agents in their unique means (Abebe, 2019; Lee & Motzaku, 2011).

As a researcher, I recognize my hierarchical position as an adult and how my analysis exerts a degree of influence over conceptualizations of the child as a victim and their position as a witness in the courtroom. As such, my position is carefully informed and driven by the newer social study of childhoods' understanding of how to respect a child's agency, autonomy, and competency from a thoroughly child-centric orientation. In other words, my position views the child as a social agent: a subject who is actively aware of their social world not obscured by the pervasive discourse of the developing child as a passive object. Rather, this thesis proceeds with the conception of the child based on an understanding that children are *not lacking* in any of the three means noted above (agency, autonomy, and competency) and as such are equal to adults in this position. As Qvortrup (1994) states:

“If children are treated differently from adults, the reason is not that they are not active, but they are not active in which adults are active. This means that the adult world does not recognize children's praxis, because competence is defined merely in relation to adults' praxis – a suggestion which is all the more powerful since adults are in a sovereign position to define competence” (p.3).

Accordingly, I argue that the hierarchical influence of generation is a mediating tool to enable agency, autonomy and competency in a child's testimony or limit it. Before demonstrating how generational authority within the context of the courtroom is a worthy institutional space to dismantle (analytically, of course), an enriched understanding of conceptions of agency,

competency and autonomy relating to childhoods advocated by childhood studies theorists and scholars are central to this analysis.

Scholars and theorists who study childhoods offer historical analyses of the origins of mostly Westernized conceptions of childhood as a social structure. ‘Romanticization’ of their innocence and passive internalization of their social worlds were rooted in ideas put forward by notable philosophical thinkers such as Kant, Locke, and Rousseau (McNamee, 2016; Wall, 2010)¹⁵. These very ideas continue to underscore modern understandings of childhood as a period when a person is malleable, impressionable, and innocent with a membership status as ‘becomings’ who required protection and control to ensure every child would *become* a rational agentic adult. Every social structure and institution a child engages with is accordingly dictated and authored by adults due to an understanding of generational subordination influencing social positions in a given institution (e.g., student and teacher in a school or a child and a parent or guardian in the family). Foster (2013) explains the discord and gap between the lived realities of a given individual and the societally defined generation and explains how it is more obscure than we afford it to be. In a similar fashion to childhood studies scholars, she notes how *a priori* assumptions of generations come at the expense of overlooking the existence of multiple realities and distinguishes this through discourses within lived experiences. Childhood studies theorists take this generational aspect to explain further how it arbitrates a child’s social status in society (Leonard, 2015). A pivotal paradigm shift of understanding the child among scholars within childhood studies established that while the generational subordination can and does dictate the degree of their construction towards these structures, by seeing the child as a *social agent*, one

¹⁵ See McNamee (2016), Wall (2010), and Moran-Ellis (2013) for a holistic chronological recollection of childhood as a reflection of historical formulations and discourse which were informed by psychological and sociological accounts studying the child as an object rather than subject.

who makes choices and invokes change in the social worlds around them, is a characteristic of childhoods less explored than it ought to be (James, 2009; James, Jenks, & Prout, 1998).

Childhood scholars and theorists critiqued social science disciplines such as anthropology, sociology, and psychology by discussing how overlooking children as social agents emphasizes their futurity, rather than their current positionality as a child, a social actor. Further, these scholars argued how ideas about *childhood* could intentionally and unintentionally inhibit the child from displaying their agency in big or small ways. More specifically, they argue ideologies representing cognitive and moral development models of childhood restrict and overly emphasize the configuration of the child as a deficit version of adults. In other words, it exacerbates what children don't have in comparison to adults instead of placing value on what they *do* have (James, 2009; Matthews & Mullin, 2020; McNamee, 2016). Accordingly, scholars critique, for example, how child rights provisions (e.g., the UNCRC), despite its usefulness and relevance, were only made out of a goal to protect the child which incidentally muted the voice of the child in matters that concern them in various ways (McNamee, 2016; Wall, 2010). As a result, the assumption of a child's innocence is transferred into assumptions of vulnerability and passivity which effectively influences understandings of how to intervene on matters involving children, one of which are legal spaces. Consequently, their agentic capabilities are undermined and overshadowed by their ostensible innocence, negating substantive opportunities to speak for themselves (Fellin & Callaghan, 2017).

Relating to themes concerning this thesis, CSA and the criminal justice system, developmental psychology, and the pathologies theorized about these victims and witnesses tend to be given the most attention and analysis. As exhibited by the literature review in chapter one, developmental psychological approaches mainly focus on the number of inappropriate kinds of

questions and determine which kinds of those questions present the most challenges for young witnesses, offering a positivist cause and effect analysis. Further, there is an enhanced concern of how these experiences will negatively affect the futurity of their mental and emotional well-being. While these applications are important contributions that this thesis appreciates, it often overshadows the underlying nuances that motivate these questions, and further how it impacts the child at that given moment, unaccounted for by statistics and figures. However, a perspective of childhood studies offers a further analysis of the assumptions and discourses embedded in each of these ‘categories’ of questions to determine how and why socio-historical contexts inform them. Moreover, this analytical perspective offers insight into how children’s agency, competency, and autonomy manifest in the courtroom through their responses despite these generationally imposed barriers. I will now focus on exploring a deeper discussion of what it means to be a social agent in the courtroom as both a child victim and a witness.

Children as Social Agents: Distinguishing their Agency, Autonomy and Competency

As stated above, definitions of agency among childhood theorists and scholars are understood as the capacity of a given individual to make choices and for those choices to exert influence on the social world (McNamee, 2016). As aforementioned, the hierarchy of generation, that is, relational authority, mediates children’s agency which permits adults to ‘allow’ for this agency to be exercised by children due to adults’ social positioning as possessing independence that children supposedly lack (Leonard, 2015). Childhood theorists critique this deficit depiction, often related to developmental models of childhood, by emphasizing ways children embody agency as demonstrated in the home, educational spaces and social relationships. They are restrained due to adults’ lack of understanding of how to interpret their actions as agentic. Discursive variabilities for example, as Leonard (2015) notes, may leave children, especially

younger ones, at a disadvantage but does not negate them from their ‘qualification’, if there is one, to recognize their agentic capabilities. Scholars such as Leonard (2015) and Abebe (2019) recognize the value of understanding children’s agency concerning the world around them, including their position in relation to adults.

The argument of a generational asymmetry of power between adults and children does not align with the assumption of ‘powerlessness’. Contrarily, children may exert a less powerful influence on circumstances than adults due to their position in the hierarchy of generational power. Nonetheless, “...children interpret, evaluate, accept and resist the power of adults and the manner and context in which it is transmitted” (Leonard, 2015, p.127). As such, Abebe (2019) points out the necessity to view agency as a continuum or spectrum rather than a fixed, quantifiable earned ability recognized by a benchmark of age. These arguments emphasize the recognition that children’s agency reflects their interactions with adults on a relational level as well as a structural level when accounting for intersectional variables, both of which (relational and structural) vary depending on the experiences of a given child.

The influence of generation is a reflexively challenging construct since, many scholars who engage in childhood studies, grapple with the sentiment of ‘that’s the way it is’ rhetoric relating to a child’s subordinated position to adults and access to power and authority which remains a conceptual obstacle. Qvortrup (1994) provides an engaging philosophical analysis to question whether this hierarchical order of adults’ power over children is ‘*natural*’ insofar as it serves as a justification to have a greater hold on social actor status over children. In essence, Qvortrup argues that for this to be the case, the two following assumptions must be indisputably true: (1) the child as a social actor is less important than the adult as a social actor, and (2) every adult behaviour aligns with the best interests of the child. The mere existence of CSA, in addition

to its prevalence, is understood as an endemic social and public health problem according to the World Health Organization (Jenks, 1994; World Health Organization, 2012) automatically negates the second condition. Secondly, the status of a child as a social actor is dependent on the definitions ascribed to the group that authors and defines what a competent social actor is. As mentioned in an earlier quote above, Qvortrup (1994) recognizes that the adult-world definitions of competent praxis cannot negate a child's equally substantial and insightful praxis. It is only a circumstance of the hierarchical condition which subordinates its significance. Accordingly, the perceived '*natural*' order of adults above children due to ontological difference is not a matter of philosophy, but rather one of "power and interests" (p.3). Regardless of this philosophical delineation, as a matter of these conditions, children are forced to be dependent on adults, whether justified or not. Accordingly, when adults are able to dictate and author what the 'best interests of the child' ought to be, it remains of the utmost significance to challenge these very goals and interests of parties who engage with children in legal settings.

This research recognizes the agency in all children. It seeks to identify where these very capabilities are exhibited and restricted by examining a case transcript when a child is in the position of a victim and witness. Adult control over the narrative in legal settings is another manifestation of defining competence at a level palatable by adults rather than the expression and interest of the children themselves, effectively influencing their display of agency. These sentiments have been expressed in this context previously by scholars such as Baraldi (2019), who states: "Children's epistemic authority is displayed through ontological narratives regarding their lives and through their contributions to public narratives. Children's agency is thus displayed as availability of choices about *what* is narrated and *how* it is narrated" (p.156). The constraints of generational authority on the contributions of children's narratives remain

pertinent within this current research and how this translates into court settings. Adult-centred definitions of competency and autonomy serve as a benchmark to dictate the degree of children's 'usefulness' in court settings and their consequent opportunity to have their epistemic authority acknowledged.

Some philosophical understandings of children's autonomy lend towards their 'immaturity' and 'inexperience', or lack of critical reflection and 'self-governance' as grounds to determine that children do not appropriately embody it (Matthews & Mullin, 2020).

Alternatively, some scholars regard children's capacity in a less restrictive sense by conceiving autonomy with a minimal understanding of self-governance by their demonstration or ability to show care for things, principles or activities. For example, authors such as Mullin (2007, 2014) recognize that children display autonomy in their forms of attachment and how they demonstrate care about others' goals or one's ability to achieve one's goals by adjusting or being aware of one's actions. Children as witnesses show such forms of autonomy by their participation as witnesses in the testimonial process with an appropriate undertaking of their responsibilities to tell their story to carry out justice. A key component in this process remains in the interaction between the child and the counsels, and police officers, who facilitate these testimonies.

As such, recognizing the relational aspect between adults and children as a critical mediator for children to display their autonomy in the best ways they can is thus essential. Adults carry the responsibility to offer structured choices based on their demonstrated interests, respect, and consideration for the thoughts and feelings of the given child. Childhood scholars, however, are critical about *how* adults offer their relative role to children by advocating on behalf of their best interests which has previously "...[shown] how adults and children, despite good intentions and a deep commitment to children's agency and authority, continue to replicate deeply

structured patterns of behaviour that give adults greater power” (Hanson, 2015, p.429).

Accordingly, childhood scholars call on adult representatives of children who are in the position to advocate for or on behalf of the child to be mindfully aware of their understanding of a child’s opinions and autonomy. This consideration, however, must grapple with the assumptions associated with recognizing children’s autonomy is often a ‘comorbidity’ of their recognized level of competency.

The newer study of the sociology of the child has demonstrated an enhanced need to acknowledge the competency of a child. In doing so, scholars argue for a broader definition to enable the recognition of children as agentic beings who demonstrate an awareness of the social world around them. Moran-Ellis and Tisdall (2018) explore conceptualizations of ‘competence’ across disciplines relating to the child and their degree of participation in several settings. They argue for a properly and explicitly defined conception of competence in matters relating to the child due to its frequent ambiguous use in the literature and the vulnerability of the argument to associate a ‘competent’ child as a social actor without any means of clarification. It leaves the argument susceptible to alternative arguments that conceive competence from empirically driven developmental, common sense or expert opinion perspectives which could counterintuitively delegitimize childhood scholars’ positionality. To avoid the conception of competence to further relegate children to a lesser role in participatory opportunities, critical engagement of the relational and contextual conditions to determine the best ways to enhance the success of children’s participation must be considered.

There are currently defined conceptions of competence in legal settings that determine children’s participation by a threshold of having or lacking competence.¹⁶ The latter disqualify a

¹⁶ In Canadian criminal court settings, as of 2006, s.16.1 of the *Canada Evidence Act* (1985) permits the presumption that all children under the age of 14 have the capacity to testify (Bala et al., 2010), but do not clarify

child from being able to participate in legal matters which concern a given individual. Moran-Ellis and Tisdall (2018) draw on some literature that critically engages with this determination of competence since this threshold determined by adults prescribes little to no analysis or requirements to measure this competence. Further, some scholars have seen a worrisome trend in some cases where children's *compliance* with adults equates to their competence. Conceptually, demonstrating a compliant nature may seem to represent competence in an adult-child relational sense. However, it may be the case that showing resistance could be a metric of competence as well. Still, the child's position in relation to an adult may limit their agency by being characterized as disobedient, deviant or worse, 'incompetent'. Moreover, even if their competence meets the level of acceptance in the courtroom, assumptions of a child's competence or understanding of the matters surrounding them may still be brought up as a limiting factor towards the reliability of their testimony. Thus, definitions of competence in legal settings do not always fully align with child-centric conceptions of competence which warrants a comparison.

For Moran-Ellis (2013), there is a necessity to recognize the structurally imposed limitations of intergenerational hierarchy and power relations. Acknowledging socio-historical conditions that work as a dynamic interplay to underscore the degree to which a given child can exert or demonstrate their agency based on their unique resources is a crucial point of departure. In this view, a conception of social competency helps to recognize the varying degrees of how a child exhibits their agency through the process of managing, negotiating, resisting, subverting, or appropriating their social surroundings rather than a developmentally-earned possession.

Furthermore, Moran-Ellis argues that the display of these acts may not always manifest in

what *constitutes* as competency to avoid exclusionary language. The only descriptive qualification outlined in the constitutionality of this provision (See *R v JS* [2007] BCJ 1374 as explained by Bala et al., 2010) equates competency to the ability of a child witness to understand questions and answer them. (See note 6 for further elaboration).

discursive methods recognized by adults due to children's varying capacities which, should not discount the ways they choose to exhibit their agency and social competence. Regardless of age, some of these resources could be crying, not providing a response (Hurley, 2015), or changing the topic of conversation (Baraldi, 2019). Understanding the child as a social actor recognizes their differentiated capacities and does not necessitate common practice discourse as a qualifying factor to be considered an agent or validate their experiences. Forcing children to engage in adult-centric methods may be a detriment to their credibility and not reflect the full extent of their capabilities. Acknowledging how children navigate their lives through their unique agentic qualities and social competence despite the adverse realities they contend with is pertinent to understanding this discussion.

Non-normative Childhoods

In recent years, child studies scholars recognize and engage in the multiplicities of childhoods in modern contexts (Lee & Motzaku, 2011). Among these scholars are those who privilege the insight of children themselves who experience forms of non-normative childhoods, often those associated with various forms of trauma that disengage from 'normal' assumptions of childhood experiences (Bluebond-Langner, 1980)¹⁷. Ultimately, the revelation of these traumatic and challenging experiences for these children emphasized the inefficiency of sheltering or hiding the world going on around them by parents or caregivers. Thus, Fellin and Callaghan (2017) distinguish themselves from a long body of literature that emphasizes the vulnerability of

¹⁷ Bluebond-Langner's (1980) *Private Worlds of Dying Children* was recognized as one of the pioneering discussions of non-normative childhoods by exploring children with terminal illnesses navigate their medical experiences among doctors and nurses as well as their social relationships with their parents and peers who are in similar positions as one another. For a further discussion on its applications, See McNamee (2016), James (2009), and Matthews and Mullin (2020).

children living with domestic violence alongside descriptions such as damaged and needy.

Alternatively, they argue:

“that framing children as ‘vulnerable’ functions to undermine their understanding of their located capacity for agency and can render children voiceless in specific contexts. Gatekeeping practices intended to protect vulnerable children have an unintended consequence of preventing them from articulating their own experience.”

(p.85).

Their research position recognizes how discourses frame children who experience non-normative childhoods in ways that reflect passivity that emerge from the language of ‘witness’ and ‘exposure’ to deviant adult behaviour. This view effectively limits a child’s ability to reflect and discuss matters which concern them as witnesses to this kind of behaviour.

Some of these same patterns are evident within the courtroom as well. They are interestingly found within their research with children concerning their ‘granted’ ability from adults to speak on their experiences as “...not being taken serious, or of their accounts being disbelieved or dismissed” (p.88). Such was the case for past witnesses when given a chance to speak for themselves in specific contexts, such as the courtroom. They endure confusing questioning practices which may leave them feeling unsatisfied, uncomfortable or unreasonably distressed (Hurley, 2015; Randell et al., 2017). The authors and other scholars such as McNamee (2016) recognize that the ‘actual’ voice alone may not and should not be the only way to examine how we visualize and perceive a child’s agency and resistance to their positionality.

The limitations of internalized socially undermining norms such as heteronormativity, patriarchy, and ableism manifest in several circumstances. Often, women and children are positioned as emotionally weak and physically less competent, which can extrapolate and

overshadow their agentic ways of engaging with spaces, they encounter demonstrating their resistance (Fellin & Callaghan, 2017; Wall, 2010). While this research is only limited to voice (analysis of a case transcript), there is value in determining the ways a child can assert small amounts of control to protect themselves in addition to agentic acts of negotiation and resistance. Within this research, this may come in the form of engaging and responding to challenging questions to reflect their agency and competency as witnesses. Fellin and Callaghan (2017) also note children's abilities to actively monitor the reactions and emotions of adults within the context of witnessing domestic violence, exhibiting their competency and autonomy as witnesses. Gauging and monitoring counsels' intentions behind their questioning practices is a documented strategy used by past witnesses according to research. The witness may orient their answers to satisfy the counsel examining the evidence (Fellin & Callaghan, 2017; Hurley, 2015). Understanding the epistemologies of the child as a witness and how this informs the conduct of adults and their subsequent treatment and attentiveness as victims in the courtroom is worthy of further exploration.

A Child in the Courtroom?

Due to romanticized ideologies of childhood elucidated earlier, dominant Western understandings of *where* a child belongs is not a courtroom. Accordingly, it is primarily a dedicated adult space intended to serve adults and may leave the child at the mercy of adult control and direction. When the courts eventually did involve children, totalizing ideologies of a child witness began to take form. This thesis recognizes how problematic these perspectives are as they overlook individualistic differences and pacify witnesses with dominant ideologies. Holloway and Valentine (2000) provide a valuable understanding of three interrelated ways of seeing and understanding childhoods. In particular, they discuss how the global and local

dichotomies of thinking about a child are limiting. Instead, they suggest that the two can be used to understand how they inform one another. They describe how global understandings of childhood often get conflated to mean ‘universal’ understandings of childhood, which are not always constant but are a common thread and study for most childhood studies at the macro level since it is the most applicable to children within a given time frame. Oftentimes, this is the pervasive way of studying childhood since local ways of understanding are often very particular. Totalizing theorizations of the developing child, the global in this case, has been critiqued for its inability to realize that not *all* childhoods can fall into this broad category because of the unique possibilities of less visible or non-normative nature of circumstance (McNamee, 2016). Similarly, this thesis argues that the totalizing romanticized conceptions of innocence and vulnerability of children in the courtroom conflate and overshadow their agentic capabilities and their relative difference amongst other young victims who may be required to testify.

Holloway and Valentine (2000) alternatively put forward the contextual significance of the local understandings of childhood and the global to fill in the gaps that both universalism and particularism undoubtedly have. They put forward studying both ‘global’ and ‘local’ for academics to realize that it may not be an antagonistic relation but a space for interconnectivity with blurred lines. “Thus, children’s worlds of meaning are at one and the same time global and local, made through ‘local’ cultures which are in part shaped by their interconnections with the wider world” (p. 769). Within the context of my research vis-à-vis the child in the courtroom, there are several pervasive ideas about the child which meet the global or macro level of study, namely their developmental position concerning their competency. In this case, the global understandings of the child in the courtroom remain a reflection of our understanding of

childhood at a given moment in time. This consequently diverts the attention away from the child's unique capabilities, which could otherwise be understood as the local.

Historically, as reviewed in the first chapter, children were considered incompetent witnesses but are now ubiquitously regarded as 'competent enough' to testify (Bala et al., 2010). These understandings are rooted mainly in the developmental study and application of children's linguistic abilities, their ability to answer questions correctly, their vulnerability to confusion or suggestibility and their proneness to be honest. Consequently, global applications and understandings of the child in the courtroom continue to leave 'individualistic' (local) versions of the child deserted. Interestingly, other scholars argue that these 'acontextual approaches' of lumping together several kinds of experiences into categories diminishes the lived realities of these children's experiences (Fellin & Callaghan, 2017).

At a local level, in the space of a courtroom, it ought to address the needs of every child if the totalizing efforts cannot account for each of their unique encounters, which position them as the victim and witnesses required to testify. (Holloway & Valentine, 2000). There are some instances where the local is present, as is seen in the application process of testimonial aids here in Canada. As described earlier, each requires an application from each young victim to be approved by the judge (Bala et al., 2010). However, these minimal attempts to address the local, only go so far as to address surface level needs of the particular victim of interest. More specifically, it does not account for their unique linguistic ability, amongst other young witnesses, their ability to recall facts or events, amongst other young witnesses, or resist confusing language amongst other young witnesses.

Accordingly, Holloway and Valentine's (2000) second relevant way of spatial thinking concerning the discursive constructions of childhood and meanings of space is fundamental to

consider as well. “Our argument is that childhood, as a discursive construction, is imbued with a spatial ideology which shapes our understanding of different environments... and that this has a range of important consequences.” (p.776). They draw on examples of how adults control the spaces in which children are ‘allowed’ in and ‘not allowed in’ based on how adults determine what is appropriate and inappropriate for childhood. Furthermore, they emphasize how these discursive constructions are not only an academic concern but one which informs practices, policy and other related contexts concerning childhoods. The courtroom, which is largely informed by discourse, is no exception, especially for young witnesses. Understanding ways to expose problematic assumptions at the ‘global’ level concerning child witnesses requires an analysis of the local contexts, which reflect the manifestations and ideologies of this particular socio-historical context. The literature on young witnesses seems to reflect an engagement in discourses that limits their agency, autonomy, and voice. Consequently, in practice, those who participate and facilitate this kind of environment may not be wary of its detriment to the child as a social agent as much as they ought to be.

The Child as a Victim

There are very few theoretical considerations of the child as a victim concerning their attitudes towards and experiences with the justice system. Quas and Goodman (2012) recognize the need for this form of analysis for young victims who call for a need to use existing frameworks of adult models of engagement with legal proceedings and see how children and adolescents’ experiences are similar and how they diverge. Due to the confines and scope of this research, such an analysis cannot be applied in this discussion as it requires extensive resources. Recently, however, scholars such as Thunberg and Bruck (2020) are among very few to direct their focus on influences that inform former young witnesses’ identity perceptions relating to

their victim status and their social conditions. Accordingly, my research is a continuation of this kind of research since there is a consensus among scholars supporting the need for a framework that centres younger victims in particular (Fellin & Callaghan, 2017). As such, this analysis will extend understandings of childhood studies and critical victimology to theorize what may be the case for young people engaging in legal proceedings by evaluating the discourse within a case transcript involving a child witness.

Critical victimology emerges as a paradigm that distinguishes itself from a positivist discourse of victimology, which investigates why certain victims are victimized as a way to understand criminal behaviour (Spencer & Walklate, 2016; Turvey & Ferguson, 2014). Critical victimology recognizes the unintended consequences of ‘victim-blaming’ such that victims precipitate or contribute towards violence against them (i.e., victim precipitation). Spencer and Walklate (2016) offer a reinvigorated need to apply the critical victimology paradigm in modern understandings of who is recognized as a victim, the extent of their victimization, and determining the conditions/identity an individual may have which contributes to whether or not their status as a victim is recognized. Within critical victimology, these processes are examined through ontological and epistemological understandings of victims and victimization, how the state acknowledges, inflicts or alternatively support victims of society, and how intersectional approaches help understand assumptions of the ‘ideal victim’ and issues with victim-blaming. While their comprehensive book does not analyze children as victims within this paradigm, its lens is crucial to this analysis. Accordingly, this thesis intends to create space for the unique lifeworlds of child victims by aligning similar ideologies of critical victimology with the newer sociological study of childhood.

Both paradigms share similar goals to leverage the voices and experiences of individuals relating to their field. For critical victimology, it is the victims/survivors and their experiences of victimization (Spencer & Walklate, 2016). For childhood studies, it is the voices and experiences of children who navigate and influence their social worlds (Leonard, 2015). While most children are recognized almost immediately as victims in situations due to their assumed vulnerable nature and status, this overlooks the nuances of the various kinds of victimization they experience and what positioned them as victims in the first place and their consequent identities as victims. Accordingly, the exposure of these nuances in research are found through interactions children have with institutional professionals including police officers who take their statement that serves as video-recorded evidence in court and both the Crown and defence counsels who examine and cross-examine the witness.

Children are often recognized as victims more quickly than other groups of individuals (Condry, 2016; Fattah, 1989) due to common discourses of their innocence and vulnerability. Unfortunately, in a regressive sense, this automatic acceptance of a child as a victim leaves little analysis or exploration of why these assumptions exist and how this perception perpetuates their vulnerability. Although there is no detailed analysis of the child as a victim and how it relates to their positionality and treatment as a witness and victim in the courtroom in past research, existing explorations that involve similar analyses motivated by underlying hegemonic and patriarchal tendencies are particularly insightful. Spencer and Patterson (2016) offer perspectives of victim services professionals' experiences working with police services and the victims, often women, they interrogate. In this analysis, they unpack the field and corresponding habitus of policing rooted in hegemonic masculinity and hegemonic femininity of the often-female victims/survivors. The consequent treatment of victims may result in aggregate traumatization

and/or victimization due to pervasive attitudes of cynicism and assumptions of ‘complicity’ understood as practices or *habitus* which emerge from stoic masculinity within the police field. This disjointed treatment, argued by the authors, is perpetuated by boundaries between the police officers and the victims’ field and corresponding habitus, which is the locus of struggle. The authors alternatively explore inclusive masculinity, which operates from an empathetic approach through the use of care and attentiveness towards the victims they engage with to mend the gap between boundaries precipitated through each field. Working towards this solution of discord between police interactions with victims/survivors was enabled through the collaborative communication between advocacy groups and victim services and relevant training for police officers to improve interrogations with victims to avoid further traumatization with the reporting experience.

The relevance of this kind of analysis reflects a need to understand how habitus operates within the juristic field (i.e., the courtroom) between child victims, police officers who take their initial statement, and counsels who examine the child’s evidence. As this discussion has levied thus far, assumptions of children’s vulnerability, innocence, and susceptibility to various forms of manipulation by adults justify the further exploration of how these discourses feed into the treatment of children as witnesses and victims in practice. This will determine how it may alternatively inhibit the full realization of their agency, competency, and autonomy. Accordingly, understanding ways to leverage the voices of child victims to similarly deconstruct the discourses and narratives within the courtroom for this research needs to be distinguished. The following discussion will describe the methodology used to determine how these attitudes and ideologies can be examined including an overview of ethics of research involving a child, the

framework of critical discourse analysis and how it will inform the narrative analysis of the case transcript.

Methods and Methodology

The following discussion comprises an explanation of the methodology used to analyze the unit of study, a case transcript of an Ontario criminal justice case involving a child witness. First, I acknowledge an overview of the ethics of care within this framework before describing how I procured the data and the relevance of a case study by examining a case transcript and its justification. Lastly, I describe the analysis of discourse articulated through ‘voice’ and the application of narrative analysis.

Methodology

Ethics of Studying Children

My research is at an ironic crossroads. Researchers, such as myself, and the justice system are motivated to protect all children, and in this circumstance especially as witnesses and victims. Facilitating an appropriate space for young witnesses in the courtroom is a different challenge than those in research. The courtroom has a less rigorous ethical process deemed ‘acceptable’ to interact and engage with young witnesses. I will return to this ironic ideal of ethics of the justice system in my concluding remarks in the final chapter. As a researcher, I respect the agency and awareness of the child witness involved in this particular case, amongst all other children, regardless of whether they find themselves in a testimonial position. For this particular research, however, the accessibility of perspective of child witnesses independent of testimonies is procedurally and resourcefully challenging due to the confines of ethics guidelines placed on researchers who are interested in working with child participants. Nevertheless, the challenges of respecting the circumstances which relegated children to their status as witnesses

while acknowledging their agency and competency through emoting or articulating their experiences as victims and witnesses can be alternatively satisfied through a case transcript.

The Ethical 'Voice'

Theorists and scholars interested in researching childhood express caution against the promotion of unitary method to identify the 'voice' of a child within research (Kraftl, 2013). Prioritizing the literal voice is said to be an oversimplification of what childhood theorists and scholars are attempting to create significance for when addressing the goals of their research and the methods they employ (McNamee, 2016). Removing the "researcher's analytical layer" is one way that has been proposed by Grover (2004) as highlighted in McNamee's (2016) discussion of researching with the child. This problematic layer can be perceived as offering a child limited choice in questionnaires or in interviews which contradicts the efficacy of the literal voice, when structured unfittingly. Alternatively, when interpreting ways to adopt a more useful approach, Kraftl (2013) suggests in some cases, children themselves are forced to transform their sentiments and feelings about traumatic experiences into words and argumentation that they do not yet have the words to articulate such realities. Fellin and Callaghan (2017), along with Agamben (2009) argue that some of these words may cease to capture the essence of the feelings felt from the events. McNamee (2016) proposes that researchers should consider and exhaust all other possible ways, particular child-friendly or 'research friendly' research methods, before resorting to the literal voice of the child.

I will examine the voice of the child through a case transcript. I, as a researcher, intend to be wary of the 'analytical layer' to not take away from the child's voice in this context by making assumptions of feeling or experience. Instead, I seek to understand how child victims' epistemic authority verbalized through their narrative of events in the courtroom occurs and how

it is possibly inhibited and interpreted as a whole. Due to the nature of this research, the likelihood of the ways questioning practices with a young witness may not be ‘child-friendly’ or ‘research friendly’ can and will be part of this discussion while considering the ethics of interrogating or cross-examining a child. Accordingly, I will explore instances of transformation or manipulation of narrative to distinguish if conceptions of childhood promote or inform these influences.

Ethical Standards

While this research does not involve the direct interaction of researcher-to-participant conduct, the subject matter still involves the lived reality of a child witnesses’ experience within the criminal justice system in Canada. Thus, my standards of ethics and research reflect the guidelines set out by the *Canadian Tri-Council Policy Statement on Ethical Conduct for Research Involving Humans (TCPS 2)* (Government of Canada, Interagency Advisory Panel on Research Ethics, 2021). Accordingly, the analysis of the case transcript will not involve any identifying signifiers of any of the parties involved out of a respect for the persons, concern for welfare and justice, as dictated by the *TCPS 2: CORE* principles. Furthermore, this case transcript does involve matters convening over actions of sexual assault and misconduct of an accused adult against a young victim. It thus remains a high priority for this research to maintain a distinguished recognition of the seriousness of claims made in this case and respect for the procedure to facilitate justice.

In the following sections, this chapter will describe how I procured this transcript and my justification of how its use to understand child witnesses’ position in the courtroom. Furthermore, I will explore how the confluences of socio-historical discourse of childhood and the consequent themes and narratives which emerge through discourse and narrative analysis.

Data Collection

My research began by using the Canadian Legal Information Institute ('CanLII'), a national database containing publicly accessible legal materials, including case summaries (Canadian Legal Information Institute, n.d.). Through the use of keywords such as 'child witness', 'child sexual abuse', 'child victim', and 'young victim', I proceeded to search for case summaries. The inclusion criterion was any case in Canada relating to the use of a child victim/witness under 18, as recognized by legal authorities discussed earlier (see footnote 1). The search results yielded children involved in both family law and criminal law cases. However, due to the nature of the research, which involves mandatory testimonial evidence from children, I included only criminal law cases in the sampling pool. To further refine the sampling pool, I also restricted the time period of cases involving child witnesses to reflect the most recent developments of policy relating to child witnesses. I did this to ensure I could analyze the most accurate processes of standards of care and court processes afforded to child witnesses according to policy within this research. As such, the *Canadian Victims Bill of Rights* was the last formally recognized reform in 2015 dedicated to victims, including children, who were required to testify. As such, I included court procedures commencing through 2015-2020 in this initial sample.

Once this sample was complete, the next steps were to reach out to counsels (both prosecution and defence) involved in the respective cases to inquire about available case transcripts. The diverse confines based on jurisdictions, mainly by Crown prosecutors' offices and their respective rules and regulations, yielded different answers. Some yielded no responses, while others responded that they could not share this information due to the sensitivity of the case involving a child witness. However, one Crown prosecutor was able to procure case transcripts from one of the cases inquired about titled: *R v A.S. 2018 ONCJ 808 ON*. The

transcripts offered sufficient content to engage in discussions concerning child witnesses, the use of testimonial aids, the examination and cross-examination of evidence. Additionally, it included examining the police officers involved in the interrogation of the defendant and initial statement of the child witnesses used as *viva voce* as part of their testimony.

It is important to note that the transcript is not a complete reflection of the entire court procedure as it did not capture the final submissions (arguments by both the prosecution and the defence). Additionally, the transcripts do not include the final judgements made for the case by the presiding judge. I accordingly draw on the final judgements in the publicly available final report (*R v AS 2018 ONCJ 808 ON*) found on the CanLII website to include the court's conclusion and their reasoning for their decision in the case as a compulsory unit for analysis. In the next section, I will describe the benefits as well as the possible limitations of a case study and the use of a court transcript as my main unit of analysis to do so.

Methods

Case Studies

In tandem with the goals of this thesis to challenge conventional methods of evaluating children as child witnesses, it adopts the 'unconventional' method of using a smaller sample, namely a case study, as its central unit of analysis. As was present in the critiques of methodological approaches in most pervasive discussions of child witnesses, larger samples are the most dominant method. The larger samples outlined in the first chapter were used to discern and distinguish appropriate forms of questioning as well as knowledges produced about a child's competence and honesty relative to their position as credible witnesses. Generally, what emerges from these forms of studies are 'universal' or 'global' and generalizable findings that can be presumed to be true for 'most' cases involving child witnesses. A key proponent to this research

is to address the lack of local and nuanced context-dependent cases of child witnesses and the individualizing experiences they contend with in the courtroom, and the accompanying phenomena that may arise within each interaction.

As discussed earlier, Holloway and Valentine's (2000) approach to childhood studies, in evaluating the phenomena young people engage with in their everyday lives, they encourage researchers to engage in *both* global and local explorations of childhood to provide a holistic analysis of this particular category. It is important to note that scholars advocate for the equal importance of these kinds of inquiries due to their unique contributions to theoretical considerations and conceptual nuances. Similarly, Flyvbjerg (2001, 2006) fervently justifies why case studies are relevant and substantive in their applications to the social sciences. For this analysis, some of the misunderstandings of case studies that Flyvbjerg adamantly approaches and reconfigures to re-sanctify, I will accordingly address the value of this methodology for using this particular case transcript as the primary method of analysis.

Flyvbjerg (2001, 2006) advances the case study's unique strengths such as its ability to provide context-dependent knowledge, falsification of propositions and theories, and a powerful narrative that is not fraught with overwhelming verification bias¹⁸. A case study of a case transcript, such as the one used in this analysis, offers a nuanced perspective into the narratives of practical reality that larger samples often overlook. Furthermore, this analysis aims to understand how the breadth of Canadian policy, in addition to the information produced from larger-scale studies, manifests in the minutiae, of a criminal trial proceeding in the Halton Region of Ontario, Canada. My research accordingly reflects the possibility of falsification or substantive challenges produced with case studies making its use successful. Its added value can

¹⁸ For an in-depth defence of case studies see Flyvbjerg (2001, 2006). Here Flyvbjerg grapples with critiques of case studies and attempts to reorient the misguided assumptions within research.

further confirm or challenge proponents of theories about inappropriate and appropriate forms of questions used by counsels found in the transcripts. Furthermore, it commits to exposing underlying themes and assumptions relating to the associated identity of the child as both a victim and a witness.

Lastly, Flyvbjerg argues that the use of a case study acknowledges that verification bias is not solely a possible flaw of case study methods but is present in all human analyses of a particular phenomenon and therefore present in all qualitative and quantitative methods. Similar to *all* research methods, it is the researcher's responsibility to be wary of their preconceived notions about their given research interests and be appropriately reflexive with their findings. The production of a practical reality through the narrative of the nuances found in case studies remains the most substantial for this research. These approaches of narrative inquiries allow for unique interaction and interpretation of a given phenomenon. Accordingly, Flyvbjerg states: "... [narrative inquiries] begin with an interest in a particular phenomenon that is best understood narratively. Narrative inquiries then develop descriptions and interpretations of the phenomenon from the perspective of participants, researchers, and others" (p.240). Based on the discussions presented in the first chapter and the conceptual foundations earlier in this chapter, my analysis submits interpretations of the courtroom based on a distinct understanding of the literature available on child witnesses and, the ongoing theoretical and conceptual challenges children contend with during their testimony. How these informed my analysis are worthy of a more profound discussion that will progress below. I present the formulation of the framework's components which motivates the analysis of the courtroom when a child is present. The research goals of this case study are aligned with the objectives to provide an in-depth evaluation of how child witnesses are accommodated in the courtroom as well as the assumptions associated with

their victim identity and status as a child influence their interactions with adult legal practitioners.

Case transcripts

This analysis method, within the context of the courtroom has been used to evaluate the discourse of lawyers' language in several mixed-methods studies that evaluate the *frequency* of appropriate and inappropriate categories of lawyers' questions.¹⁹ It is accordingly a verifiable way to assess the conduct of a courtroom; however, for this particular research, a complete qualitative approach is applied. To review, as chapter one described, the categories, based on existing research, outlined appropriate questions as those that were open-ended questions and free recall with a focus on central details over peripheral ones (Andrews et al., 2015a; Andrews & Lamb, 2019). Inappropriate forms of questioning involved the use of structurally complex language along with closed-ended prompts or questions and suggestive questions (Andrews & Lamb 2017; Evans & Lyon, 2012; Klemfuss et al., 2014)²⁰. These varied forms of questioning will be relevant for this particular analysis because of their ability to discern lawyer's abilities to adjust their questions to accommodate younger witnesses or their reluctance or lack of consideration to do so through the analysis of case transcripts. How this analysis diverges is by *not* focusing on the frequency of questioning types.

Alternatively, these categories of questions (appropriate/inappropriate) are relevant for this analysis for the goal to explore underlying conceptions of a child as a witness regarding the questions that they are statistically 'able' to handle. In particular, if challenging or inappropriate questions are apparent in this current analysis, there is motivation to further probe *why* a counsel

¹⁹ See Andrews and Lamb (2019), Connolly, Coburn, and You (2014), Denne et al., (2019), Irvine et al., (2016), Szojka, et al., (2017) which evaluate large samples of case transcripts to evaluate lawyers' questioning practices in the United States, Scotland, and New Zealand.

²⁰ For a complete list of appropriate and inappropriate questions, see Appendix A.

would resort to these prompts and further the *how* motivations to discredit the witness may reflect the restricting assumptions about a child as a witness (e.g., vulnerability, passivity, suggestibility, impressionability). I provide a deeper discussion of how legal proceedings and the accompanying parties use discourse and narratives to present a story in greater depth. In particular, the description and presentation of the witness and accused's identity and their associated credibility.

Fewer studies use case transcripts involving young witnesses as a method of analysis qualitatively; however, those that use this method produce critically engaging results. Baraldi (2019) provides an intriguing analysis of institutional interviews by exploring a case study in Italy involving a child witness and the influence of their narrative of abuse. His research uses transcripts of institutional interviews between the child witness and legal practitioners to interrogate how the child's ontological narrative was produced and transformed to fit into the adult praxis deemed acceptable for the decisions to be made about the case. Conceptions of a child's epistemic authority over their own narrative became a site of contention upon this analysis. The child's articulations (verbal and non-verbal) were not the standard desired by the legal practitioners. Based on this outcome, my research will similarly apply a narrative analysis under the authority of critical discourse analysis to distinguish the benchmark of praxis in a courtroom and how the compound of generational and institutional hierarchy over the child witness manifests in the Canadian context.

Discourse and Critical Discourse Analysis

Similar to other qualitatively-driven research, this research heavily engages with the notion of 'discourse', a profoundly critical and robust concept to be contended with in this analysis (Locke, 2004; Wodak, 2008). Given its vast applications in qualitative research, it is

thus necessary to operationalize the term for this thesis to avoid obfuscation. Mills (2004) addresses the myriad uses of discourse in research as a critical tool popularized and problematized most notably by Foucault and how it is used to understand how forms of power, knowledge, and truth are societally (in)formed. In this way, a Foucauldian perspective of discourse permits this research to challenge the embedded assumptions of a child in the courtroom by understanding how discourse systematically produces ways of thinking and behaving. One of the most pervasive ways to apply this critical understanding of discourse is through critical discourse analysis.

This thesis seeks to engage in critical discourse analysis (CDA) by focusing on how language frames a story in the courtroom, understood as narrative analysis. As the discussion in this thesis thus far has levied, there are challenges in how language is operationalized within the courtroom, namely the appropriateness of particular language and formulations of questions counsels direct towards children. Accordingly, Wodak (2008) states that: ... [critical discourse analysis] aims to investigate critically social inequality as it is expressed, signalled, constituted, legitimized and so on by language use (or in discourse)” (p.2). This research focuses on how discourse can consequently consolidate and entrench generational hierarchy through complex linguistic praxis and institutional knowledge of dominance imposed by legal practitioners over child witnesses.

While critical discourse analysis is not explicitly used in past research that analyze case transcripts (See Andrews et al., 2015a, Andrews & Lamb, 2018, Connolly, Coburn, & You, 2014, and Denne et al., 2019, Szjoka et al., 2017), elements of critiquing discursive derivations are marginal but still subliminally relevant to their overall analysis and presents the opportunity for a deeper inquiry. This research intends to expand this critique to capture these hidden

assumptions of children's competency, suggestibility, innocence, vulnerability in practice and situate it with a reality contextualized from a socio-historical understanding of childhood (Locke, 2004). Furthermore, this research draws on these underlying themes in the courtroom to understand how characteristics of childhood are established and used to 'protect' the child witness or wield these characteristics as their downfall as a capable witness (Somers, 1994; Baraldi, 2019).

Narrative Analysis in Institutional Contexts

This thesis draws on narrative analysis to distinguish how institutional spaces manipulate storytelling. Past scholars have applied this mode of study in contexts relating to how institutional interviews produce, reify, or restructure victims' identities (Thurnberg & Bruck, 2020; Pemberton et al., 2018; Walklate et al., 2018). This thesis subscribes to narrative frameworks described by DeFina and Georgakopoulou (2012), who provide an overview of Foucauldian and Bourdieusian description of power and discourse as a foundation for this motivation of narrative analysis. By understanding Foucault's description of power and subjectivity dictated through discourse and Bourdieu's contemplations of social relations, they describe how narrative analysis can investigate how power and inequality are reflected in social issues through discursive and non-discursive practices to maintain or alter social order. Accordingly, they state that: "Power is not viewed as an abstract and superimposed force but as something that becomes instantiated and negotiated through concrete and local mechanisms of discursive and communicative interactions" (p.130). With this view, deconstructing the courtroom storytelling processes facilitated by legal counsels is an evidenced locus of struggle for those with less institutional knowledge, specifically the witnesses.

One of the barriers which emerge from the courtroom and the institutional knowledge is the ensuing power both counsels possess is to create the story that best matches the side they argue for. Through methods of entextualization, contextualization and re-contextualization, they summarize Elrich's (2001) study of a Canadian sexual assault cases to emphasize how judicial practitioners produce stories. Specific interpretations of events to contextualize require a negotiation to create new meanings to be constructed or reconstructed enabling the possibility of re-contextualization and entextualization. The former involves the potential of one party to create significance in a particular element to make a specific narrative acceptable within that same context. The latter can be mobilized to enmesh this further by extracting particular discourse out of context and presenting it in a newer context to portray a new interpretation. The significance of this reformatting of storytelling with a young witness remains pertinent in this particular discussion.

Institutional knowledge of the judicial process is an existing challenge for any witness who must engage in delivering a testimony as it reflects a power imbalance between witness and counsel. This challenge is further complicated for children who are required to testify as they deal with linguistic *and* conceptual barriers due to their age as a result of their social position in comparison to adults. Accordingly, this analysis will explore the presence of inappropriate kinds of questions and the emerging assumptions about the child (enabled by critical discourse analysis), as well as an exploration of how children's storytelling capabilities are facilitated, transformed and formalized to fit into an institutional setting (enabled by narrative analysis). Finally, the following section will describe a coding framework to demonstrate how these particular analyses were applied through the coding process of the case transcript.

Coding Framework

Qualitative research considers the use of coding as beneficial to all forms of methodology due to its ubiquitous process that does not subscribe to a particular research methodology (Saldaña, 2013). Despite its vast applicability, the term of coding is best summarized as “most often a word or a short phrase that symbolically assigns a summative, salient, essence-capturing, and/or evocative attribute for a portion of language-based visual data” (p.3). Accordingly, researchers apply codes or ‘labels’ to relevant signifiers within their data to form categories and broader themes to inform their overall analysis (Elliot, 2018; Saldaña, 2013). Coding is a heuristic process that develops links between ideas and concepts based on the researchers’ analytical and ideological perspectives of their given research position.

For this analysis, creating codes and categories was done in a cyclical format by reading the case transcripts and flagging initial codes which were relevant to the research questions, conceptual and theoretical considerations and dominant ideologies extracted from the literature review. It is important to note that the coding process is done with reflexivity and flexibility which is why *a priori* codes are produced to formulate an initial coding framework organized by themes relative to foundational concepts described earlier within this chapter (Elliot, 2018). Similar to past researchers, my coding process took these initial codes and transformed and re-transformed, linked and re-linked in a manner that best creates a framework suitable for analysis (Saldaña, 2013). Finally, I made an exhaustive and completed list of the final codes

using NVivo, a suitable coding software used by researchers to organize and annotate the codes during the labelling and organizing point of their coding process (See Appendix B).

The following two chapters will provide an in-depth discussion of the findings discovered from the coding process. A holistic discussion of the analysis and implications of these findings will be presented by primarily addressing the assumptions of childhood in the courtroom and

how this parlays into the identity and treatment of the child victim in the next chapter. The following chapter will then address the policies relevant to child witnesses in the courtroom, police interactions and interrogative procedures, and the general practices presented in the courtroom. These discussions will explore limitations of the current analysis and future directions for future research to consider when exploring involvement of child witnesses in the courtroom.

CHAPTER THREE

Developing the Narrative: Essentializing Conventional Characteristics of Childhood

This chapter delineates how the adjudication process develops a suitable narrative for both parties (the accused and the complainants). A discussion of the relevant questioning practices used to re-create this story are integral to this understanding of the development of the narrative presented by both counsels and the court.²¹ Finally, the underlying notions and assumptions of the essentializing tactics used to justify the conclusions made in this adjudication process will be discussed and analyzed in further detail. I argue that these continuously embed the paradoxical assumptions about a child's (in)capability as a witness and dismiss their status as competent social agents who autonomously navigate and articulate their experiences. As a forewarning, before reading any further, it should be made clear that the proceeding discussion deals with themes of sexual touching of a minor, which may be discomfoting or triggering. Please proceed with that in mind.

Words with Counsels: A Play on Words to Develop the "Relevant" Narrative

The following section aims to demonstrate the process of narrative development facilitated and mediated by adjudicators in the courtroom. The practices and strategies of counsels, both the Crown and the defence, became apparent as it delineated their targeted goals for their particular side. What was noted immediately upon analysis was a series of crucial elements to present the "relevant and essential facts" (*R v AS 2018* para 86) used for both sides in their machinations to develop a theory to 'win' their case. Using institutionally recognized "common sense" praxis within the courtroom resulted in a series of problematic methods and convenient oversights that served to diminish the child witness' credibility (*R v AS 2018* para 78).

²¹ Throughout this discussion, I refer to the judge who presided over the case as either 'the judge' or 'the court' interchangeably as it is recognized as such in the case transcripts that were analyzed.

As the subsequent discussion will clarify, both counsels and the judge practice methods of questioning²² that reflect the dominant role of adult praxis and control in the courtroom. Moreover, they contribute to the entrenchment of the ‘childish’ identity of the witness all of which served to diminish their epistemic authority and status as a competent interlocutor.

Demarcating the Commonsensical Approach

In assessing the child’s evidence for this particular case, the court distinguishes two essential components to determine the reliability and credibility of their testimony. First, through the application of what the judge terms a “common sense approach”, the court necessitates (1) chronological cohesion as an essential component to the narrative, and (2) the timing and process of disclosure²³. In their attempts to construct suitable narratives, both the Crown and defence counsel employ appropriate and inappropriate forms of questioning in different ways. What became evident is the formulaic tendencies and associated tactics to develop these narratives. From a literature perspective, these findings are not far off from past research that found these tendencies of an incorporated use of inappropriate and appropriate forms of questionings at varying levels for the defence and Crown counsels (Andrews & Lamb, 2019). Furthermore, my findings were a reflection of the Crown and defence’s goals and tendencies found in past research. The defence counsel focused on suggestibility, honesty, and consistency while the Crown relied on plausibility (Connolly et al., 2014). Perhaps the best way to portray these strategies is to present the narrative through a word game that details the schemes and tactics each player, or counsel, uses to win the game.

²² See Appendix A for descriptions of all questioning types, formulations, and variations.

²³ The court cites *R v Marguard* [1993] 4 SCR 233 and *R v Tennant and Maccarato* (1975), 1975 CanLII 605 (ON CA), 233 for their derivation of what serves as precedence for the assessment of a child witness’ evidence and the ensuing required components of their testimony.

The ‘words with counsels’ narrative game have key players within two distinct categories: those who understand and uphold the rules of the narrative game and those who are required to follow the game’s rules. The first category involves those who represent the critical playmakers of the judicial institution and thus have an established repertoire of experience in their back pocket, which serves as leverage over those forced to play the game. These playmakers involve the Crown and defence counsel, and the court who each play a role in the construction of, in this case, the child witness identity. The Crown and the defence counsel are presented with the challenge to win their case with carefully chosen words, questions and solid theories while the court mediates. Alternatively, the second category of players includes those required to enter the domain foreign to their day-to-day activities, and most importantly, their day-to-day communicative praxis. These players almost always involve witnesses. Witnesses are required to respond to the questions asked of them by both counsels as honestly and adeptly as possible. The last relevant component of the game involves advantages and the existing institutional advantages category one key playmakers are privy to. This bonus component comes with the socio-historical advantage of age: the leverage of adult status over child status.

I will first begin with the Crown counsel; whose goal of the word game is to represent the witness’ identity through the plausibility of the story. For this case, the Crown’s strategies began with mostly appropriate question formulations by asking open-ended free recall questions and few option-posing questions. For example, the Crown uses the following question structures:

Q²⁴: ...do you have a favourite subject in school?

A. Art.

²⁴ For reference, the ‘Q’ represents the person examining the evidence or witness with their questions, in this case it is the Crown. It can also represent the defence counsel during cross-examination. The ‘A’ represents the person responding to the questions, the witness, and in this particular case it is the child witness.

Q. Art, nice. Do you like to draw or paint, which one?

A. Draw.²⁵

The Crown uses these kinds of questions almost consistently when following along with the witness' video-recorded statement given when formally disclosing the events in question. This is intended to maintain consistency between the video-recorded statement and the in-person testimony delivered by the child witness. The Crown presents a narrative through mostly yes or no questions to discern what happened during the alleged sexual touching. For example, the Crown establishes the nature of events as follows:

Q. And where were you in the bedroom?

A. I was on the bed.

Q. And where was [the accused]?

A. On the bed

Q. Okay. And you were wearing pants that day you told us?

A. Yes.

Q. Okay. Were you wearing underwear?

A. Yes.

Q. Okay. Did [the accused]'s hand go above or under your pants when he touched your behind?

A. Under.

Q. Okay. And did [the accused]'s hand go under or over the underwear when he touched your behind?

²⁵ The primary question is formatted as an open-ended free recall question (e.g., Do you like X?). the secondary follow-up question is more of an option posing-question which can be considered appropriate if asked in a non-limiting way (e.g., Do you like to X or Y?). This can be considered inappropriate if, for example one were asked: "Do you like to lie or steal?"

A. Under.

Q. And can you tell us was it at the front of your body, the back of your body?

A. Back.

In this excerpt, the Crown uses directive questions to develop a vignette of how and what transpired during the events in question. As exhibited here, the Crown adheres to the formula of simple questions that present relevant details about the nature of the touching, where it occurred and how to establish plausibility. The Crown also scarcely used suggestive questions or upshot formulations²⁶ to lead the witness or, in other words, expertly put words into the witness' mouth, which was expected. One instance that should be noted had, in addition to the inappropriate nature of questioning, introduced preconceived notions and assumptions of childhood topics in the courtroom. The following excerpt was one instance of the Crown's use of suggestive questions and upshot formulations:

Q. Nice. And, I guess, if you weren't here today, you're supposed to be in school, is that fair?

A. Yes.

Q. You probably want to be in school than be here today, is that fair?

A. Yes.

Here the Crown uses suggestive language in their first question to establish a spatially specific area they perceive the child witness should be in. Additionally, they use an upshot formulation in their second question by stating that the child witness would 'want' to be in school rather than in

²⁶ 'Upshot formulations' are understood as a suggestive presupposition of inserting words into the mouth of the interlocutor that was not previously said. It provides an interesting discussion of how presumptive language and suggestion can lead a conversation as presented by Baraldi (2019) in their analysis of institutional interviews investigating child sexual abuse.

the courtroom. Suggestive questions and upshot formulations such as these can be considered problematic due to its nature to force a narrative not brought put forward by the storyteller. If the Crown had asked, “where would you likely be today if you weren’t here?” that would be a less problematic formulation as it permits the witness to come up with their response with no suggestive language. To further suggest that the child witness would *want* to be at school also offers less of an autonomous response for them since it is likely that no person would wish to find themselves testifying in a courtroom.

Aside from using this inappropriate questioning format, the underlying assumptions associated with the child’s identity and school are a cause for caution. While this may not be the most outrageous suggestion to make, this assertion about school and the excerpt included earlier about the child’s liking of art fortifies the child-like identity. These confirmations of child-like spaces and activities, as this chapter addresses later, serve to limit child’s visibility as a social agent and instead promote an aura of innocence. While keeping this assertion in mind, it is necessary to see how the narrative of innocence is used differently by the defence counsel, who has alternative goals and is later essentialized by the court.

Fundamental Components of the Narrative: Linguistic ‘Gotcha’s’

The game plan for the defence relies on capitalizing on opportunities to plant seedlings of doubt within the court. The following section takes on linguistic traps as they alone do not fit into the mould of creating a case against the child as a credible witness. In addition to these linguistic follies, the underlying commonsensical ways a child’s identity makes the challenge of accepting them as a credible witness increasingly harder. For this particular case, the defence counsel’s interrogative tendencies were an exemplar of the findings of past research (Andrews & Lamb, 2019). By entextualizing and re-contextualizing the narrative, the defence could pivot any

inculpatory evidence against the accused and frame it as the folly and confusion of the child witness (De Fina & Georgakopoulou, 2012). In other words, the defence found ways to develop distrust in the credibility and reliability of the child witness through opportunistic cherry-picking to spin a narrative that removes possible blame from the accused. Ultimately, the goal here was to confuse the witness and draw out specific details about the child witness' feelings towards the accused to build a narrative of motive to fabricate. There are a series of linguistic tools in their arsenal for the defence counsel to achieve their goal of discrediting and confusing the witness. These tools involve using questions that are suggestive and leading, the inclusion of multiple questions within one statement, the focus of peripheral details, and the use of negative polarity.

The defence counsel's approach for chronology involved questions about peripheral details that are less relevant to the plot of the event in question. These consequently are a source for how confusion transpires in the witness' interaction with the counsel and how they slowly spin the web of discrediting them and entangle them with the words they use. For example, the defence counsel chooses to clarify the size of the bed where the events transpired. After the child witness had confirmed that the bed was most likely the same size as the one they had at home, the defence counsel decided to probe further to determine how many people could sleep on the bed at one time without touching:

Q. You know, I was gonna' say, 'cause, so, when you said, when I said, "Three people in total", you said, "Two adults and kids". Is that two adults and three kids, two adults and one...

A. Two adults...

Q. ...child?

A. ...would fit on the bed...

Q. Okay.

A. ...and then another time three kids would fit on the bed.

Q. Okay, so separate.

A. Without adult – yes.

Q. Okay. So, what we're saying is if there, if [sister] and [accused] were in the bed, that would be, that would be two adults, that would be comfortable for two of them, correct?

A. Yes...

Q. But....

A. ...and three kids would be, like three separate kids on another occasion without adults in the bed would be....

Q. Would be comfortable for the three kids?

A. Yes.

Q. But it will be a full bed at that point, right?

A. Yes.

This excerpt exhibits a drawn-out point about the optics of the bed which may ostensibly serve to create a vignette of the size of the bed and how any people could fit on it at once. However, it could also be interpreted as a tactic to create a moment of confusion for the witness who may not have memorized the size of the bed when the events in question transpired. This tendency of defence counsels to focus on peripheral details is something to take note of as it presents the opportunity to throw off the witness by not engaging in black or white answers, and address details that are not central to the events in question (Denne et al., 2019; Szjoka et al., 2017). These moments of confusion begin to build as the defence counsel shifts to similarly capitalize

on peripheral details concerning the kiss that transpired between the accused and the child witness. The nature of the defence counsels questioning proceeded as follows:

Q. You would agree with me, [child witness], though that you would remember something if a person put his, his or her tongue in your mouth, correct?

A. I was not, I was 10 at the time.

Q. Okay. No, but, no, no, I understand you were 10 at the time, but you would remember that, correct?

A. I don't really remember. It happened a year ago. I told really late.

Q. Okay, so are you telling us that you don't really remember what happened even when you spoke to the constable?

A. I remember most of it.

Q. You do remember most of it?

A. I had remembered because I had, I had to tell my parents.

Q. Okay. I guess what I'm confused about a little bit is in the same interview, in the same conversation you had with [Detective], you first tell him at page 27 that he, [the accused], puts his tongue in your mouth?

A. Yes.

Q. Okay. But then five pages later, so it's not too long after, you say to the officer, you shake your head, "No" that you really can't, you can't remember if [the accused]'s mouth was opened or closed when he kissed you?

A. Yes.

Q. So, which is it? You couldn't remember, or you did remember that – I guess I'm – see, I'm looking at it – you're saying you couldn't remember whether his mouth was opened or closed, correct?

A. Yes.

Q. But you could remember that he put his tongue in your mouth?

A. Yes.

The interaction between the witness and the defence counsel presents a couple of important elements of both the roles each player plays in developing the narrative and the ironic assumptions about the child understanding the schematics of a kiss. Firstly, it is noteworthy how the defence counsel interrogates the child witness through suggestive language such as “you would agree with me” and suggesting that she doesn't remember the event when reporting it to the police. The child witness demonstrates their agency by resisting this language through the assertion that they had some memory of it but, in their defence, they had disclosed a year after the events had occurred in addition to telling the counsel that they were only ten at the time of disclosure. Secondly, the use of their age as a position of resistance about the optics of the kiss is distinctly intriguing as it suggests that their understanding of how a kiss works may not be something they fully understand. On that point, the unrelenting interrogative conduct of the defence counsel indicating that the child witness should understand how a kiss works and whether or not someone's mouth is open or closed when a tongue is in or around your mouth as common sense is. The defence counsel uses this reduced clarity from the young witness to imply their lack of awareness of how a kiss works to obscure their credibility as a witness further. Additionally, it shows how the child witness' understanding of a kiss differs from the defence as they continuously assert that while they do not remember whether or not the accused's mouth

was open during the kiss, they do remember that the tongue was in their mouth. The assumption that this is something the child witness *should* know is an irony I elaborate on in later sections. Before describing this further, it would be remiss not to point out two other convenient narrative tactics the defence counsel uses to promote the witness' lack of credibility through the use of negative polarity, entextualization and re-contextualization.

The defence counsel tended to use 'negative polarity' to question the child witness, a term identified by Evans and Lyon (2012) in their previous research. This term identifies the use of all-encompassing language such as 'always' or 'never' when posing a question to the child witness. This often sets up an opportunity for the child to contradict themselves, damaging their credibility. This was found to be the case in the final reasoning made by the court when they inquired that if the child had "never lied", for example, why did she take such a long time to disclose about these alleged incidents (*R v AS 2018*, see para 88). Conveniently, for the accused, the defence counsel did not follow up on these responses and unfortunately, neither did the Crown counsel in their re-examination leaving another loose end giving the court reasonable doubt. Not only does this have implications about practice which will be described further in the next chapter, the relevant issue relating to the child witness and their accompanying credibility is put under fire when they are posed with linguistically challenging questions: the defence counsel is asking about lying about what happened between the child witness and the accused, rather than them ever lying in their entire life to their parents. In this way, the defence counsel can capitalize on the child's perceived inability to catch this 'all or nothing' polarity and fall into the trap of damaging their credibility. The amalgamation of confusion, faulty recollection about the optics of a kiss and polarizing the witness as someone who does not lie work together to form the theory the defence proposed to the court in their final submission.

Accordingly, in describing how there was an apparent motive to fabricate in their final submission, the defence states that the child witness had testified that they tried to avoid the accused because they knew their parents were not fond of him and did not want him around their sister either. This was an outcome of entextualization since the actual context of why the young witness knew to avoid the accused was the result of the child's conclusions. The child witness had already explained that they were aware of actions the accused did that also made them wary of him such as *their* observations of his drug use and rude actions *they* observed when the accused and his then girlfriend, the witness' sister, had moved to their new apartment. The extrapolation of the assumption by the defence to state that the child witness knew that their parents didn't want the accused around the witness' sister was deliberately done to sensationalize the negative influence and its entrapment on the mind of the child witness. Moreover, this is despite the fact that upon re-examination, the child witness had testified that their feelings of wanting to avoid the accused was not on their mind when they went to the police to formally disclose about the events in question. Rather, they stated in their testimony that "if I didn't tell [my parents], he would do it again". This particular context was left unaddressed during the defence's final submission, and the Crown failed to address this gap in their final submission. As a result, the defence effectively reduces the credibility and existing autonomy of the child by removing their conclusions made about the accused and re-contextualizing the events to overemphasize the parental influence on their perceptions implying that they had a motive to fabricate. The conclusions of the defence's final submission are significant as their theory was ultimately believed as the most feasible reason for why the child witness had found themselves in court that day. Discerning how the court came to these conclusions that resulted in the

judgement of finding the accused not guilty is exceedingly important and telling. The following analysis will shift to the mediator of the narrative game, the court.

The final component to the words with counsel's game comes down to the key player who is tasked with being the ultimate decider. The court must decide whose theory they believe more; the representative of the witness, the Crown or the representative of the accused, the defence. Ultimately, the court sided with the theory, put forward by the defence, that the child witness presented too many inconsistencies, believed that their parents influenced them, and that they were "honestly mistaken" about the events that occurred (*R v AS 2018* para 96). The overt reasons for this judgement rested on, as aforementioned, the chronology of the narrative and the nature of the disclosure. The covert reasons, that is, the underlying assumptions of children as impressionable, passive, and innocent, will be discussed later in the chapter. It is primarily the goal to first dissect what these overt reasons were and how the defence's theory made the child witness' testimony go awry.

During the evaluation of the child witness' re-telling of events, the court uses paradoxical reasoning to explain: "I also do not know when certain events are alleged to have occurred. Although precision is not necessary, F.S. could not tell the officer or the Court what year or season it was." (*R v AS 2018* para 93). In re-constructing the timeline of events, the court re-contextualizes the child witness' re-telling of the seasons relative to the events in question as an unawareness of what month or season it was as a means to find them unreliable. The defence counsel fed into this particular narrative when clarifying the seasons when other events not in question occurred:

Q. All right. So, I guess I want to start off by, by asking you, do you remember when you started to go over to [your sister] and [the accused's] place?

A. Yes.

Q. When, when was that?

A. Around a month after they moved.

Q. Do you remember when, what month and what year that would have been in?

A. No.

Q. No, okay. Do you remember what season it was? Was it winter, was it fall, summer, spring?

A. Season when?

Q. When they moved, when they moved into their house?

A. No.

Q. No, okay. Do you remember the first time that you went over there, was it hot, was it cold, were there leaves on the trees?

A. Around fall...

Q. Around fall.

A. ...I'd say.

Q. Go ahead. So, were you in school when you first started to go visit with Tabby and Adam?

A. Yes.

Although the child witness could not remember the exact date, they were able to use school as a time stamp that made sense to them in their testimony. However, this laid the foundation for the court to question the child witness' credibility by demonstrating confusion over what season it was for an event that was not relevant to the events in question. The final judgement reflects that the court saw this difference in understanding seasons as a weakness.

When later probed by the defence, while the child witness demonstrated a similar pattern of not remembering specific months, they were able to explain to the defence that the first incident of inappropriate events in question occurred in winter:

Q. And again, I know this is difficult for you to have to relive and remember, but do you remember what happened first?

A. My buttocks.

Q. Okay, but is – so, the first incident, are you saying that he touched not only your buttocks or your bum, but also your breasts and your vagina on one, on one shot?

A. Yes. He touched my vagina after the movie.

Q. Okay, and so the first time you're saying this happened, do you remember what, what, was it hot outside, was it cold outside, was it fall, was it spring?

A. It was before Christmas.

Q. So, the first time was before Christmas?

A. Um-hum.

Q. And that was the buttocks?

A. Yes.

Q. Okay. But from that same incident, that's where you're saying that he also touched your breast, and he touched your buttocks, and he touched your vagina?

A. An hour later, yes.

Q. Okay. Then the second one you state that he just touched your vagina. Was that, was that after the movie that you're talking about, or another specific date?

A. After the movie.

Q. Okay. And when did the kissing happen?

A. Kissing happened another sleepover.

Q. Do you remember again if it was hot or cold outside, winter, summer?

A. No.

Q. No, you don't remember, or you don't, or....

A. I don't remember.

This was later re-examined by the Crown who clarified and distinguished that the events happened in summer and winter, as it was two separate events. Despite the child witness demonstrating a clear difference in understanding the time of the year relative to what common sense adult understanding of the times of year may be, the court used that as a justification point to explain how unreliable they were.

I must note here about the advantage of institutional knowledge that a young witness may not have. While it may seem common sense to the court that a witness should take stock of what time of the year it was when the events in question took place, that may not be considered relevant to the witnesses themselves. For various reasons, witnesses may have trouble remembering such details (e.g., stress, trauma-related repression, lack of relevance to the story) and thus not something they actively try to remember when testifying (Caprioli et al., 2017). The court equated this as a component of the lack of credibility of the witness. The court's superior knowledge of how to properly re-construct a timeline and re-telling of the events also took the form of critiquing the counsels' lack of follow up in certain points of the examination process.

In particular, the court critiqued the gaps within the timeline of events that prompted the child witness' disclosure of the alleged events. This happens to be a gap that I agree with such that the Crown counsel could have done a better job to determine the catalyst of *how* the conversation about the accused came to affront with the child witness' parents. Especially since

the events in question happened a year before the child had disclosed and eventually reported the events to the police. Consequently, due to a lack of this follow up, the child witness' reasoning of not wanting to tell their sister to "not make her sad forever" and keeping it from their parents because they were "scared" they wouldn't believe them was not enough of a reason for the court. I would push the court's argument further to state that there were gaps due to the use of vague language when referring to the events in question that added to the demise of the child witness' credibility and reliability.

As a portion of the final reasons for judgement, the court critiqued that: "[the] chronology of events shifted and incidents which at one point were one act only, became a number of acts on the same day. I could not follow the chain of events because there wasn't one." (*R v AS 2018* para 93). While the court seems to shift the blame of inconsistency onto the witness, a tendency that seemed prevalent and pertinent to this vagueness happened to result from the imprecise language of referring to the events in questions as "on that day". Both counsels, in their examinations constantly referred to the events as "on that day" rather than being more specific to the nature of the events. For example, they did not refer to it as "the day of the touching" or "the day of the kiss". This may perhaps be language refrained from use to avoid instances of leading questions. Regardless, this vague language is a flaw of the questioning process that penalizes any witness, regardless of age, to be on their proverbial 'p's' and 'q's' when discerning the imprecision of language by the counsels. Nonetheless, this opportunity was not afforded to the child witness, and as aforementioned, attributed to their associated lack of credibility and reliability as a witness.

Ultimately, the choice of words and the (in)convenient elaboration on certain details demonstrated through this 'words with counsel's' depiction determine the outcomes of the case

for the accused and the child witness. For the child witness, their fate hangs in the balance of the Crown appropriately co-authoring the timeline of the events for the court. In this case, the Crown was unable to do so. Contrastingly, the defence, whose competing task is to defend the accused and embed inconsistency and doubt within the Crown's re-establishment of the timeline of events was deemed successful. Consequently, the resulting outcome of the court's decision resided in the inconsistency and gaps elicited from the defence's interpretation of the events. As the proceeding discussion will entail, the folly of this decision does not solely rely on the competency of the child witness. It rather has more to do with the restricting boundaries the adult adjudicators place the child in.

Essentializing Childhood: Building a Plausible Child Identity

Through the mobilization of the varied narrative-building tactics of the counsels and the accompanying gaps outlined by the court, the establishment of the characteristics of the child witness were made evident. Various scholars flag how the active diminishing of the cognizance of the agency of the child is similarly used within the discursive practices of the courtroom to justify why the witness' evidence is not credible or reliable (Fellin & Callaghan, 2017). The translation of the pervasive construct of innocence as a convincing monolithic attribute to children related to the conventions of (western) childhood²⁷ is demonstrated through contemplations of child-like play, impressionability, and ostensible memory lapses creating inconsistency. These very attributes linked to childhood are thus reinforced in the praxis and reasoning within the courtroom which underscores the commonsensical approach of the court as erroneous or flawed.

²⁷ I refrain from using the term 'childhoods' in this portion of the analysis due to the totalizing nature of the court to apply unilateral views of childhood rather than individualistic ones.

The most plausible theory the court found for the reasons of judgement surrounded three significant issues, one of which was the feasibility of child-like acts such as ‘horse-play’ and ‘tickling’ to be misconstrued as inappropriate or sexual touching. The following reason was attributed to the child witness’ lack of communicative craft and consequent intelligence acceptable in the courtroom. Lastly, the final reason was attributed to the allegedly “overwhelming” influence of the parent’s perceptions of the accused. The subsequent discussion seeks to further dissect the reasons for these judgements and how the court used essentializing characteristics of childhood to justify their reasoning for quantifying the alleged events as the child witness being “honestly mistaken”.

Playmakers representing the institution of the courtroom, the Crown, the defence and the court, collectively played a role in forcing the child-like identity onto the child witness. For example, as noted earlier, the Crown had begun their rapport building with the child by establishing their age, their grade in school and their favourite subject (see page 75). This rapport building serves as a reminder to the court to be wary of the witness’ status as a child and develop an identity of ‘innocent’ qualities about the child witness. Concomitantly, both the court and the defence counsel label the child as the “little one” and “young [child witness]” respectively. The defence counsel at one point refers to their parents as “mommy and daddy” which was done in the context of inquiring about the nature of the disclosure. The titles used to characterize the child witness serve as a contributing factor to developing the child-like identity that minimizes their visibility as a social agent and propagates their innocent features. Ultimately, this theme of innocence served to negate the verifiability of the child witness’ testimony in two of the following ways. Firstly, this imposition of naivety served to disaffirm the competency and agency of the child by challenging their memory, more specifically, their ability to recall certain

peripheral details about the events in question. Secondly, the imposition of minimizing the child's agency came at the cost of relegating the testimony to a consequence of being influenced by their parents' feelings towards the accused.

To the point of responses to peripheral detail questions, the instances of the child stating 'I don't remember' was an interesting paradox that contributed to the identity of the child witness as lacking in consistency and competency. It was mentioned both in the court's assessment of the evidence and final reasons for their judgement. This is noteworthy because it is likely that, in preparing witnesses for a testimony, research suggests that child witnesses are told to resort to this answer when they are unable to give a solid and accurate answer due to a possible challenge of locating memories of the alleged incidents (Denne et al., 2019; Szjoka et al., 2017). This is recommended in pre-trial preparations for young witnesses to avoid being inconsistent and consequently damaging their credibility. This was undoubtedly the case as the defence counsel *told* the child to state, "I don't know" or "I don't remember" if they can't answer. This presents the challenging damned if you do damned if you don't paradox for the child witness. They either have to choose an option that limits their credibility by stating that they do remember but may change their answer to slightly adjust what they are saying or resort to saying 'I don't remember' which reduces their reliability to a certain extent for the court. (Denne et al., 2019; Szjoka et al., 2017).

The proverbial saying "kids are like sponges" was never overtly referred to as such and yet it consistently reigned clear in the discourse of the courtroom as it was often alluded to and consequently became a significant ramification to the conclusion of this trial. At several points in the transcripts and the final reasons for judgement made by the court, there was an overwhelming conceptual framing of the child witness' identity as a passive impressionable object rather than

an actionable rational subject. For example, in the defence's final submission, it was stated that "F.S. had a motive to fabricate her evidence. She knew her parents did not like A.S. and did not want him around T." (*R v AS* 2018, para 76). Ultimately, in the courts final reasoning, they concluded:

"I find it realistically possible that F.S. was influenced by her parents to think negatively of A.S.; that she was honestly mistaken about the nature of the accidental touching during tickling games when T. and D. were present and that her evidence is not credible or reliable given all the gray areas that emerged in the evidence presented at this trial." (*R v AS* 2018, para 96).

These explanations and justifications for the judgement of the court to find the accused not guilty on all counts as a part of the overarching reasons was bound by the thread of the perceived impressionability of the child which explicates that they did not come to the conclusions of what happened to them on their own. In this way, the court effectively limits the child witness' autonomy as a social agent by suggesting that the events that happened to them result from parental manipulation rather than the plausibility in itself. This breakdown is particularly thought-provoking because it begs the question of whether or not there truly is a conventional demarcation of when human beings, in general, stop being 'sponges'. Could it not alternatively be argued that as human beings, we are technically *constantly* absorbing information? What then could be the difference and subsequent assumption that separates children and adults from being sponges?

One prevailing difference is that adults are assumed to be more autonomous when they pick and choose what they want to hear and accept and embed that in their understanding of what happens to them. Contrastingly, children are represented as impressionable sponges with little to

no autonomy and moral wherewithal which obscures their ability to draw the line of whether or not they can make up their minds for themselves and make their own decisions about what is being done to them and by whom. Weaver (2019) describes this dissociative tendency of adults to impersonalize children to that of a 'sponge' or 'parrot' who only reflect the behaviours and attitudes of those around them (p.92), especially their parents. In this view, Weaver poignantly describes how adults paradoxically diminish children as social agents, relegating them to the status of a 'parrot' or 'sponge' while simultaneously explaining how they are also adept in gauging adults and intuitions and attitudes in "crafty" and "cunning" ways. For this particular case, the irony of promoting the innate child identity of the witness while faulting them for being a child by critiquing their competency and appropriate linguistic ability that adults themselves position them in is highly relevant. The child witness is forced to listen to adults while also being faulted for listening to adults which continue to develop their identity of inconsistency and their resulting 'lack' of competency. The consequent milieu of the child witness resorts back to the damned if you do, dammed if you don't paradigm. These interpretations restrict the view of the child as a meaning-making social agent in their own right and effectively reduce their opportunity to challenge these views by diminishing the value of their voice and experiences.

Ultimately, the feasibility of the defence counsel's theory about the overwhelming influence the child witness' parents had about the accused held supreme in the court's final reasoning. The creation and fortification of the child-like identity of the witness justified the feasibility of the 'perceived' sexual touching was reasoned to be a result of horseplay and tickling games. This perception relegates the child's input to a consequence of listening to their parents and confusing children's games for sexual touching. As the following discussion will detail, despite the evidence of agency and competency of the child witness for this case, the

voices of the adults continued to overpower that of the child's. This discourse continuously embeds the characteristics of the child which legitimizes the voice of the adults over the child's.

Hegemonic Imbalances of Adult versus Child Epistemic Authority

A persistent trend that seemed to permeate within this transcript was the overwhelming authority adults' voices continue to have over a child's. In various ways, the court continues to uphold the adult competence praxis and diminishes the significance of the child's praxis (Qvortrup, 1994) by emphasizing their inability to relay seemingly 'obvious' or 'simple' things in their testimony such as the seasons when the events had happened. Accordingly, the court leveraged the stories of the accused, the portrayal of inconsistency by the defence, and the influence of the parents' perceptions of the accused over the child.

The court prioritizes the accused's voice by finding no issues with the admissible statements made to the police²⁸. The court did not heavily evaluate the competency of the accused; it is automatically assumed that there were no issues with his competency despite admitting that he was "coming down from a high" when his statement was taken. His statements were still viewed as voluntary as well as truthful. Accordingly, the court seemed to automatically accept all of his explanations as the most truthful re-telling of the events compared to the child witness' (*R v AS 2018*, para 94). For the kiss that had occurred, the court accepted the theory that it was accidental and that the older sister, the accused's girlfriend at the time, was there as well. The court acknowledged that it was just a kissing game initiated by the child witness, and their head had turned at the same time that he had attempted to kiss their cheek. He also said to allegedly apologize immediately after the witness said that it had made her uncomfortable. These statements were taken at face value because, in the court's final judgement, no evidence

²⁸ The accused's statement interestingly did not have any mentions of "indiscernables" (technical difficulties) whereas the child witness' statement did. This will be spoken about in more depth in the next chapter.

suggested ‘intentional sexual touching’ but rather just horseplay and tickling with the sister present, again, taking the accused’s word over the child’s. This is a direct dismissal of the child witness testifying that the sister was in another room when the sexual touching had occurred. Interestingly, there was no evaluation or analysis of the competency or reliability of the accused’s statement. There was no deliberation about whether or not the statements made during the interrogation with the investigating officer were truthful or not. Instead, there was an *automatic* assumption of the accused’s responses as statements of fact, whereas the court did not afford the child witness the same automatic designation. How can it be unwaveringly known that the accused is telling the absolute truth without some form of similar credibility assessment?

Currently, the structure of the adversarial justice system does not require the defence to take the stand during trial, as they have the right to remain silent (Department of Justice, 2016). This eliminates the possibility of comparing the examination of child about the event versus the accused. However, what is known is the confusing nature of questioning that the child was presented with when it came to the cross-examination. Consequently, the amalgamation of finding the child witnesses’ statement and testimony to be unreliable and not credible negates their side of the story and how the events happened from their perspective. This permits the court to rule out the child as completely truthful in their statements, whether fact or not. As outlined in the above section, the defence played their ‘successful’ role in confusing the witness and exacerbating the witness’ ostensible lack of credibility and reliability. The convenient tactics used to leverage the adult voice were similarly used in the defence’s strategy. As such, the court persistently amplifies the adult voice while the capable child’s voice was minimized and quieted.

The court silenced the child’s voice by simply speaking louder than the child or over the child’s voice, especially those in a position of institutional authority. For example, in questioning

the defence counsel conducted, there were many times when the child witness was in the middle of their answers, the defence would interrupt the child. At one point, the child was talking and upon being interrupted, when the defence counsel urged the child witness to continue what they were saying, the child no longer had anything to say. In a study done by Cassidy and colleagues (2017), children explain how they automatically accept their status of being able to do little to alter situations and thus limits their opportunity to participate and contribute in more substantive ways than they do now. Similarly, in this case, the child witness, despite being given the opportunity to speak, was silenced or was constantly required to be substantiated by the accompanied authority of the adult voice.

There was an aura of irony presenting the child witness as competent but not competent enough in the frequent iterations of corroboration of the child's story by the adults. Regardless of this, the court believed the child less than the accused. There was corroboration that the accused and the witness were left alone for some periods of the day when the witness' sister would change her son's (the child witness' nephew) diaper in another room. However, the court chose to believe the theory proposing that the tickling and horseplay that occurred was always done with the sister and nephew of the witness present. Similarly, the child was constantly justified by the police and parents, and affirmed by the prosecution that no one told her to say what was disclosed to the police during their first statement. Taken at face value, one may not question what the issues of this defence may be. For a young witness in particular, this is a substantial barrier that takes away from the existing agency they demonstrate by reporting their harms to the police and going into court to testify about the alleged events.

This relates to my earlier discussion about the embodiment of "kids as sponges". These commonsensical assumptions about children overshadow their existing autonomy and

competency as social agents in a way that discounts their epistemic authority substantially. This manifests in such a way that several adults have to affirm whether or not they are telling the truth or not. This was in spite of the fact that the child witness in this case clearly demonstrated articulate answers and was often tripped up when asked confusing and vaguely worded questions by the defence. This necessity of corroboration reflects the similar praxis of why children were excluded from the testimonial process I discussed in chapter one. The justice system previously understood that children were inherently unreliable and could not be trusted (Bala et al., 2010). These archaic sentiments continue to be embedded in the discursive practice of the courtroom and the reasoning of the court. Consequently, the theory of the witness having motive to fabricate put forward by the defence produced enough doubt in the court's reasoning. The automatic assumptions associated with child-related characteristics that seem intrinsic to their identity dominated over the established presence of the child as a competent social agent and accordingly a witness. Despite several instances of the child's apparent ability to communicate, aside from some conceptual challenges, the child's visibility as a competent and autonomous social agent remained overlooked.

The Embodiment of the Child as a Social Agent: Resisting the 'Childish' Identity

In the courtroom, children who are witnesses are required to come in and respond to the questions asked of them by the counsels who construct and re-construct the story of events. In so doing, the counsels, particularly the defence counsel, constantly spoke to the child in a condescending fashion by recognizing their agency while simultaneously weaponizing their position as a child to poke holes in their testimony. This paradoxical treatment of the child is what I refer to as "institutional gaslighting" which imposes a new story over the one told by witnesses and negates its plausibility by imposing their identity, in this case, the child identity

limits their claims to credibility. The proceeding discussion seeks to outline a few ways the child witness demonstrated their agency and interrogate why the court did not acknowledge these in the final reasons for judgement.

To begin, the displays of awareness of the child's agency had the tendency of being put forward mainly by the defence and to a lesser degree the Crown through the recognition of how "difficult" being in the child witness position was. For the Crown, they would often embed acknowledgements about how difficult it was for the child witness to relive and remember in some of their questions. In these statements, there is *some* validation of the reality of the experiences of the witness in addition to recognizing the challenge of recalling facts about events that happened a year and a half after disclosing in this case. Alternatively, the defence counsel uses similar statements in their cross-examination of the child witness. However, in addition to this, the defence counsel also challenges the child witness by critiquing their memory when disclosing to the investigating police officer about the extent of the kiss. Furthermore, they critique their integrity by insinuating that the child witness is a liar or distrustful. This inconsistent manner of establishing that it is a challenge to recall what occurred on the day of the events in question while simultaneously challenging them about their memory appears condescending. This is likely a consequence of the compounding of the essentializing tendencies of the counsels and court imposing the child-like characteristics to the composition of their identity and the frequent implications of their lack of competency for recall. In this sense, the challenging paradigm of being validated by one arbiter of justice only to be denied by the defence counsel and the court of the truths explicated by the child witness, the maddening experience of institutional gaslighting rears its head.

Institutional gaslighting has been referred to in similar discourses concerning adult victims and institutions' failures to adequately respond or prevent social harms. Otherwise referred to as "institutional betrayal" in medical spaces whereby nurses for example are penalized for "whistle-blowing" (See Ahern, 2018 and Smith & Freyd, 2014), Kennedy-Cuomo (2019) explains institutional gaslighting in relation to institutions' failures that contribute to silencing the victim in pursuit of their own self-interests. The arguments Kennedy-Cuomo posits are of particular relevance to this analysis due to its exploration and critique of how respected structures which carry authority and consequently greater power removes the culpability of blame or wrongdoing by shifting the onus onto the victim or making them question their own lived reality. For Kenney-Cuomo, this argument of institutional gaslighting or betrayal is limited to contexts of sexual assaults which occur on university campuses. This thesis takes this term further to extend towards the various levels of this institutional gaslighting which begins, in this case, primarily with the conduct of defence counsels and their interrogative tactics which serve to undermine and question the witness' experiences.

At the level of the judiciary, their final judgement heavily determines the de-legitimization of victims experiences. For this case, the court contributes to this gaslighting by pivoting the blame onto the victim for being confused about the extent of innocent touching misconstrued for sexual touching. Furthermore, the sentiments the court posits entrenches restrictive ideologies of childhood that deny the child's claim of victim status and a social agent. As the proceeding discussion will detail, in spite of these constant challenges to the validity of their experience, the child witness still prevailed as a competent social agent that demonstrated their autonomy, social competence and resistance to certain claims or insinuations about their identity. Furthermore, the child witness demonstrated an important outcome of children

recognizing their relative position to adults and speaks to a broader barrier of age and the authority their voice has due to their position in society.

In their testimony, the child witness consistently demonstrated an astute self-awareness of their well-being. During the replaying of the video-recorded statement taken by police, the child witness interrupted and asked the court if they could have a break. The court agreed to a break to allow for the witness to get “reoriented” without question. The child witness may have been notified or prepared pre-trial that they could ask for a break when needed, as is protocol according to existing research (Hurley, 2015). Nonetheless, the child witness in this instance demonstrated that they required a moment to recollect themselves as they were brought back to the moment where they told their version of the events formally for the first time. The child witness also exhibited an extent of their demonstration of competence in their descriptions about their disclosure and their feelings towards the accused.

The child witness displayed immense care for their older sister, the accused’s then girlfriend, when describing why they waited so long to disclose. The Crown counsel had inquired why they had not told their sister about the sexual touching immediately after it happened. The child witness had responded that a month prior to the touching, they had been made aware of their sister’s challenges with mental illness. Accordingly, the child witness described that “telling her things would make her sad forever, and I did not want that” about the events in question. In this way, the child witness demonstrates their social competence by explaining that they were aware of the mental state of their sister. Consequently, by refraining to disclose, to protect their sister’s mental well-being demonstrates selflessness and empathy. Moreover, in their consideration of disclosing what had occurred between the accused and themselves, as aforementioned they told their parents out of an awareness and fear that “he would do it again”.

This demonstrates their understanding of the threshold of authority that would disallow such traumatic events to happen again by informing trusted adults. In another instance, the child witness demonstrated an awareness of their relational authority as a child to adults explaining why they did not immediately disclose to their parents.

In their explanation given during testimony about waiting to disclose to their parents, the Crown draws out the following responses:

Q. Okay. And did you tell your parents the same day that [the accused] did these things to you? A. No.

Q. Okay, and again, I'm not suggesting you did anything wrong, you didn't. But I want to know again, in your own words, why didn't you tell your parents that day?

A. I was scared.

Q. What were you scared of, in your own words again?

A. They wouldn't believe me.

In this excerpt, the child witness describes justification for their reasoning to not disclose immediately after the events transpired and an internalized perceived lack of credibility by possibly disclosing the events to adults. The expression of fear for not being believed is a challenge many victims face and accordingly have to address why they disclosed at a later point in time after the events took place (see Ahern, Kowlaski, & Lamb, 2018). Most importantly, this further strains on disclosure for younger witnesses due to their relational position to adults and the resulting asymmetry of advocating power.

This may stem from children's understanding of their relational authority when it comes to adult's at the familial level. These were attitudes expressed by young people in a study done by Cassidy and colleagues (2017) in determining how children situate themselves amongst their

relationships and their evaluation of the statuses of a child and the characteristics of childhood. Children found that their voices are not listened to in familial and school settings. This finding more generally reflects the perceptions of a child's understanding of their status within their lifeworlds and broader society. They understand that they can do little to alter situations. For child victims, in particular, the culture of silencing and why victims stay silent for so long and its derivatives are far more reaching than the just the interactions at the familial level.

Caprioli and Crenshaw (2017) speak specifically towards the deleterious issues of the culture of silencing victims of CSA before reaching the courtroom and how the testimonial process further compounds onto their silence. Their literature review describes how children are aware of their positionality compared to adults and, the consequences of not listening to adults may be intrinsic to their nature to both be obedient and listen to adults. In fact, they go on to suggest that: "[t]his form of manipulation is particularly insidious, because the silencing comes directly from the child's own understanding of the relationship and her role in it rather than any explicit instruction from the perpetrator" (p.193). Children's relational status to adults in any setting can be a formidable challenge. Yet the child victim, in this case, demonstrated a continued self-awareness and assurance by resisting the assumptions posited by the adult voice.

In an exchange between the child witness and the defence, the child witness faces questions about their integrity:

Q. Earlier today when the Crown asked you some, a question, he asked you why you didn't tell your parents or anyone about the, the same day that any of the touching occurred. And your...

A. Yeah.

Q. ...response was that you were scared that they wouldn't believe you?

A. Yes.

Q. They being your parents?

A. Yes.

Q. Okay. Is there a reason why – did, did you ever lie to your parents before and therefore....

A. Not....

Q. Sorry, let me finish, okay? So, did you ever lie to your parents so that would, so that they didn't believe you afterwards if you came to them with something as a concern?

A. No.

Q. Okay. So, why did you think your parents wouldn't believe you?

A. Well, I, when I was younger used to think of the worst that could happen before the good, so I felt that they wouldn't believe me. It was just a thought that was in my head.

Q. So, you've never lied to your parents about anything though, correct?

A. Not that I can remember.

This excerpt exhibits several interesting points to consider. Firstly, the resistance to accusations or suggestions of them being a liar in addition to expertly responding to a negative polarity question which tends to be a “gotcha” tactic by defence. As aforementioned in an earlier section, the defence uses this kind of language to catch the child by either admitting to lying or challenging them for their lack of capitalizing on their truthful ‘innocent’ identity. This positions the witness as not credible for not disclosing right away since they claim not to be a liar. Secondly, the child speaks to the challenges of not disclosing and fearing for the worst-case

scenario if they were to disclose to their parents. This was already established as a likely consequence of the relative position of status children have in various spaces in comparison to adults.

Lastly, and most interestingly, this excerpt demonstrates how the child's voice was temporarily silenced by the defence telling them to let them finish speaking. There is a distinct irony here since, as aforementioned, there were numerous times the child witness was interrupted by the defence counsel without issue. Interruptions were only a problem for the adult when they themselves were speaking and a child interrupted them. This re-establishes the issue of how adult's epistemic authority continues to overpower the child's in the courtroom. Unfortunately, despite their resistance to several constraints described in this chapter, the child witness could not resist the theory baited to them by the defence counsel that framed their relationship with the accused as strained and poisoned due to the implied impressionability of their negative perceptions of the accused. The overarching reason continues to be the tangled web of childhood and its grips on the identity and resulting presumed lack of credibility and reliability of the child witness.

It is the conclusion of this case that reflects the confines of childhood and how the court intentionally or unintentionally sought to diminish these exhibited qualities of the child as a social agent. The possible reasons for this could be attributed to the lack of awareness of the agentic child that this thesis recognizes. Alternatively, it could be attributed to the tendencies of confirmation bias inherently laced in the court's reasoning of lumping the experiences felt by the child witness to instances of child play. This contributes to the enshrining and reification of the standards of childhood and the consequent status of the child to justify why their position should remain asymmetrical to that of adults. Baraldi (2019) speaks towards this institutional tendency

to transform the ontological narrative of the child witness into a conceptual, most importantly ‘reliable’, narrative that satisfies the status quo. Thus, the interpretation of a child’s ontological narrative of abuse becomes a conceptual and eventually public narrative. Due to the hierarchy of generational order, the child has no say in challenging or contributing to their testimony as their only substantive opportunity has passed. Their piece has already been spoken and morphed into ‘acceptable’ knowledge and facts – adult’s praxis – about the events based on adult’s tendency to adhere to the causal and reliable paradigm that is suitable for the judicial system and not the victims.

This concluding point leads to a greater emphasis on continuously prioritizing adult-directed and informed decisions that continue to dominate the courtroom. Thus, the following chapter seeks to address the inherent need of adults to prioritize protection over the participation of the child witness continuously. Furthermore, it will address how in the case of this particular child witness, the very instruments advocated under the spearhead of protection embedded in policy and legislation counterproductively contributed towards confusion and consequently resulted in an additional barrier for the child’s testimony. Accordingly, this analysis will explore an in-depth discussion of testimonial aids used in our justice system.

CHAPTER FOUR

Policy, Police, and Practice: The Jeopardizing Outcomes from ‘Protecting’ the Child

This section analyzes the formalized ‘protection’ oriented methods used when children are involved in the testimonial process. The use of testimonial aids in Canada and their usefulness in this particular case will be a critical component in this analysis. As the following discussion will detail, their use can be counterproductive despite its intentions to ‘aid’ the communicative element in a testimony. Additionally, these interactions are problematized and analyzed by focusing on the police officer’s conduct and questioning practices. Next, I will address possible alternatives and adjustments to the testimonial process by introducing varied approaches from other international adversarial justice systems. As an alternative, I consider transformative justice approaches and child-centred advocacy. I divulge into the accompanying strengths and limitations of these alternatives. Lastly, the following chapter addresses the outliers and loose ends of the justice process and its adequacy and efficacy in promoting the child as a social agent and its confines in defining the “truth”.

Testimonial Aids: Successes or Setbacks?

The outcomes of this particular case emphasized a need to describe the existing benefits and drawbacks reforms have imposed for young witnesses. The following discussion will provide an overview of what went well with testimonial aids and, most significantly, what went deleteriously wrong. Among the testimonial aids used, I focus on video-recorded evidence facilitated by police services in great depth as it was, interestingly, one of the largest setbacks. Furthermore, the questioning practices of the police officer involved in interrogating both the child witness and the accused were of significance to the court and consequently integral to this discussion.

Testimonial Aid Presence

For the *R v AS* trial proceeding, several of testimonial aids were functional to the process. The court afforded the child witness the following testimonial aids upon application as per the *Criminal Code*: A publication ban (s.486.4(1)), testimonial delivery via CCTV (s.486.2(1)), and used a support person (s.486.1). These protection-based provisions were jointly used to protect the child witness' identity and security, provide an alternative method rather than testifying in the physical courtroom itself, and to provide an accompanying non-partisan individual to prevent the child witness from testifying by themselves in a separate room. The integration of these provisions was a non-issue and did little to negatively interfere with the justice process reflecting the discussions of past researchers who emphasize its importance in facilitating child witness testimony (See Bala et al., 2010)²⁹.

Although I cannot deduce whether or not the child witness, in this case, felt that they benefited from the use of these provisions, past research, as indicated in the first chapter, have championed its benefits by past young witnesses themselves (See Chong & Connolly, 2015, Hurley, 2015, and McDonald, 2018). The perceived success of these particular testimonial aids can ostensibly promote the consequent success of advocacy for more appropriate forms of aids for facilitating the testimony of a child witness. While this thesis recognizes these successes, similarly, it must recognize the failures of specific testimonial aids that may be counterintuitive in its goal to protect the interests of the child witness.

Video-Recorded Evidence: Can You Hear Me Now?

²⁹ It should be noted that although s.16.1 of the *Canada Evidence Act* is not considered a testimonial aid, it is an adjustment of the swearing in process for child witnesses (Bala et al., 2010). Instead of using the 'to be sworn in', the court made it clear that it was a 'promise to tell the truth' as per s.16.1. This is likely due to formal purposes of the testimonial process.

This particular trial, independent of the discrepancies of underlying assumptions about childhood restricting the existing agency of the child³⁰, had one significant drawback: the video-recorded evidence testimonial aid (s.715.1)³¹. Extensive technical difficulties significantly obfuscated the outcomes of the video-recorded evidence. In the court's final judgement, they stated: "[t]here are 123 "indiscernibles" noted by the transcriber. Some of those go to the *heart of the allegations* themselves. The statement is therefore hard to read and the video-tape does not clarify matters" (*R v AS 2018*, para 10; emphasis by author)³². The court's sentiments here reflected what they could discern concerning the conversation between the child witness providing their initial statement to the investigating officer, which lacked overall clarity. For example, when disclosing the extents of the sexual touching, the following excerpt was outlined by the court in their final judgement:

[20] At the same time he touched her breast under her clothes and he [indiscernible].

[21] Officer Amore then uses the phrase – "and he squeezed your breast. What happened next?" The rest of this page is [indiscernible] (p. 25) [22] F.S. said that, "He did it twice, it was [indiscernible] he was kissing me [indiscernible], I don't like it...He puts his tongue in my mouth....And bites my lip." (pp. 27, 28) [23] F.S. said that it happened 2 months ago before Christmas, in October "Or [indiscernible] around there...It was during the week...it was on the weekend. It was, like, I went over Friday and I stayed over." (p. 29) [24] It was the same as the last time. They

³⁰ See Chapter 3 for an analysis of the confounds and restraints of the assumptions of childhood imposed on child witnesses' ability to be perceived as existing social agents.

³¹ Video-recorded evidence (s.715) was enacted in 1988 and later amended in the Criminal Code allows for the admissibility of the video-recorded evidence upon application for children under 18 years in all cases 'within a reasonable time' of the event in question. The child would adopt testaments made in the recording and it would suffice as their testimony. The child witness must be present for a cross-examination in Canada.

³² Interestingly, it should be noted that the accused's video-recorded statement had no mention of technical difficulties in the final report. This is despite the fact that both statements were taken at the same police station, however, at different times.

were all in the bedroom on the bed watching a movie. T. left the room to change D. and A.S. kissed her. “He says ‘Come [indiscernible]’ he whispers in my ear, [indiscernible] he pulls me closer to him.” (p. 31)

The intended purpose of s.715.1 for vulnerable witnesses is to jog the memory of their primary formal disclosure to the police and is often integral for the prosecution’s case (Bala, 2001; Bala et al., 2010). During the trial, this excerpt exhibited a small display of many technical difficulties impairing the audio quality. Consequently, it obscured the contents of what the child witness had said to the police during their statements. As displayed in the excerpt above, there was a distinct challenge to follow along with their version of the events. This came at the cost of a source of confusion for all parties, including the counsels who referred to the hearing difficulties several times during their respective examinations. These hearing difficulties played a role in distinguishing the context of sentences that the defence used to build the case against the child witness that described there was a motive to fabricate:

Q. Okay. Now, last question, or I’m hoping it’s the last question. Page 34 of your transcript. Sorry, I can’t give you a bit of context, but at, towards the top, after you nod your head, “Yes”, [the detective] says, “Okay”. You state, “Like I never liked him”.

THE COURT: Can I just interject for a second?

[THE DEFENCE]: Yes.

THE COURT: I heard, “Like I never liked it”.

[THE DEFENCE]: Okay, and that’s what I was, that’s what I’m just....

THE COURT: Did you hear that too?

[THE DEFENCE]: I heard the him, and I put in question marks “it”...

THE COURT: Okay.

[THE DEFENCE]: ...so I don't know. That's – and I appreciate that, Your Honour, so....

THE COURT: All right.

[THE DEFENCE]: Q. So, I guess I wanted to know, were you referring to anyone or someone or something when you, when you made that comment to the constable?

In this excerpt, the significance of a *singular* word determined both the context and the intentions behind what the child witness attempted to say in the interview with considerable technical difficulties. When posing the question back to the child witness after the court's intervention, the child clarified that it was the accused and a specific act he had done that they did not like. I draw on two critical points from this excerpt.

Firstly, it identifies a rare instance during the examination of the child witness when the court intervenes to prohibit the potential use of an upshot formulation by the assumption of the defence to state 'him' over 'it' in their line of questioning. This demonstrates a degree of judicial intervention that prevents a form of a suggestive question posed by the defence to the child witness which, past research takes note of as discussed in the first chapter (Westera et al., 2019). The second point to note is the importance of clarity and quality of the video-recorded evidence as it can adversely obfuscate the meaning and context of the victim's statement. When taken out of the context it initially intended to represent, the defence counsel had the opportunity to re-work this narrative to fit the description of the child witness having pre-conceived feelings about the accused that contributed to their motive to fabricate. It is again unclear how instances like this may have impacted their memory and ability to recall details in their initial statement for this child witness. However, it remains clear that while at surface level, the use of testimonial aids on

legislative paper seems black and white, this excerpt reveals a reflection of difficulties that make it more complex.

The irony of a testimonial aid hampering the re-clarification of events is not evident in past research. Past scholars have found in investigative settings with past witnesses that the video-recorded statement has helped them recall certain details of events that helped to mitigate their fears of omission and consequently to seem less credible (Ahern, Kowalski, & Lamb, 2018). Reports of outcomes of technical difficulties in past research stem from the use of CCTV for the following reasons: such as an image and sound lag, focusing the camera on the accused, failure to set it up appropriately due to lack of training of courtroom staff, or that the technology was not available (Hickey & McDonald, 2018). Furthermore, from the perspective of adjudicators, some prefer not to apply for the use of CCTV at all. Some witnesses have also reported how using testimonial aids may give them the appearance of being ‘weak’ in front of the offender and the court (Ahern, Kowalski, & Lamb, 2018). Some defence counsels have gone as far as to say that they dislike the use of testimonial aids such as screens and CCTV as it creates a barrier for them to discern whether or not children are lying or that not facing the accused makes it easier for them to lie (Bala, 2001). These sentiments from defence counsels speak to a more significant issue of their lack of grasp of child witnesses’ agency and social competence, which I address in later parts of this chapter. For this particular discussion, it is imperative to continue to probe the drawbacks of testimonial aids. In this case, the significance of technical difficulties lies in the necessity of case studies such as this which larger-scale studies may not necessarily account for as it has not been cited heavily in past research. However, there have been logistical drawbacks of s.715.1 that are relevant to this analysis.

Bala (2001) describes some of the benefits and drawbacks of video-recorded evidence to aid vulnerable witness' testimonies and how these attitudes vary among judges and defence counsels. Some judges appreciate the use of s.715.1 as it helps to assess the of the credibility of the witness. They can discern how much the child's re-telling of events differs from the recorded video and their in-person testimony. Bala notes, however, that some children who partake in their initial statement may not understand that witnesses must give a full recollection of the events during their police interaction. For this particular case, the court pointed out in their final reasoning for judgement that there was no chain of events by stating: "([note]: The time periods in the 2 charges before the Court is also different with no explanation given.)" (*R v AS 2018*, para 93). The inconsistencies that may have stemmed from the video-recorded evidence and the child's in-person testimony via CCTV could result from the following things: (1) the individual differences of the child witness and their conceptions of time and/or (2) the impacts and consequences of delays. The following section explores this theme in greater detail.

The Confines of Time: Details and Delays

For this case, there were a few instances that demonstrated this particular child witness had struggled with temporal concepts. What may seem "commonsense" to the court and perhaps the defence was an established issue for the child witness. Upon re-examination by the Crown, the following example included here demonstrates how the child witness' understanding of time differed from that of adults:

Q. Okay, so earlier on, [child witness], you said you think that most of these things happened when you were 9-years-old?

A. Yes.

Q. Okay. Can I get you to refer to page 36 of your transcript? So, sort of near the top, you tell me if you see this, it says from [the detective], “Okay, and do you remember the first time it happened?” Do you see that there?

A. Yes.

Q. Okay. It says on the page it was done, what I heard was, “It was summer”, and then underneath that [the detective] says, “Okay, and you said summer that just passed?”. You had nodded your head, “Yes”, and the officer asked you again, “Okay, and how do you know it was” – first, let me ask you this, was it the summer that just passed, or was it the year before that?

A. The summer that had just passed.

Q. Okay. When’s your birthday?

A. December 21st.

Q. So, when you – okay, so when you say it happened a year before, at the time it happened, you told us you were 9?

A. Yes.

Q. Okay, so this statement happened in January. At that point, you were how old?

A. I would have been 10.

Q. Okay. So, is that why you’re saying it happened the year before?

A. Technically, yes, ‘cause New Years had passed.

Here the child witness demonstrates their understanding of using the phrase “the year before” which may get misconstrued by adults who may not similarly conceive time the way this child does. This difference is evident in the next passage when the defence had cross-examined the

child witness before the re-examination. The differences and reason for the clarification can be seen as follows:

Q. Okay, so just help me understand then. You said you were 10 at the time?

A. Yes.

Q. And you said that you told late, correct?

A. A year later.

Q. Okay. And unless I hear you wrong, you said you couldn't really remember because you had told late and it was a year later, correct?

A. Yes. I was 9 when it happened, but I told at the age of 10.

Q. Okay. And you're 11 now?

A. Yes.

Q. So again, at age 10, that was a year after you said all this happened, do you agree with me that you were having difficulty remembering events that occurred a year before when you were 9?

A. Yes.

Q. And you didn't tell your parents until right before you went to speak to the police, correct?

A. Yes.

Q. Which was, again, about a – you didn't tell your parents until almost a year after you said these allegations happened?

A. Can you rephrase that?

Q. You didn't tell your parents anything until you were 10, correct?

A. Yes.

Q. Okay, so almost a year after you said these things occurred?

A. Yes.

This excerpt demonstrates the key differences in the use of language between the defence counsel and the Crown. “A year later” for the defence counsel exhibited in their questioning in the above excerpt diverges from the child witness’ understanding as they described in the re-examination above that “new years had passed” and not exactly a year later. The Crown was alternatively able to establish that the child witness referred to the summer that had just passed when they were 9, had their birthday in December, and formally disclosed the events in the New Year in early January. The defence counsel alternatively uses “almost a year” to quantify the delay of disclosure as suspicious. In reality, the defence counsel attempted to discredit the witness on a technicality and capitalize on their different explanation of a timeline as a weakness. This excerpt speaks to a more substantial issue of individual differences children may have when it comes to conceptions of time, something that these ‘common sense’ approaches while assessing a child’s evidence attributes to ‘mental immaturity’. In this way, a flaw in the justice system’s rigidity in children’s understanding of time as ubiquitous is alternatively pivoted as a flaw in the child’s testimony and their consequent unreliability and lack of credibility. Furthermore, this instance of an uneven outlook on the meaning of time is for both the adult defence counsel and the child witness speaks to more significant issues that the court necessitates in establishing fact from fiction.

Delays of disclosure and adjudication were a significant issue for this particular case. The excerpts above indicate the child witness had disclosed closer to half a year after the events in question had occurred. The adjudication dates accordingly occurred two years after the events in question had happened. According to past research, delays of disclosure are a result of several

contributing factors in past research. For this particular witness, their reasons for the delay, as discussed in the previous chapter, was due to a fear of their parents not believing them and not wanting to tell their older sister to not make her “sad forever”. Past research accredits adjudication delays to be a source of elongated emotional trauma which can add to the challenge of memory and recall pre-trial and have lasting effects during the trial itself (Bala et al., 2010; Plotnikoff & Woolfson, 2011; Randell et al., 2017). Various scholars and advocates have urged to expedite cases of young witnesses, particularly to limit the impact of emotional wear and tear and mitigate the effects of elapsed time and its confines surrounding memory. For this witness, the time that had passed certainly was a limiting factor as they admitted to memory difficulties to the defence due to not disclosing to their parents or sister when the events had occurred. The child witness’ memory difficulties were later accredited to the justification of the court’s final reasoning to explain how the child witness was likely “honestly mistaken” about the events. However, there was no acknowledgement of how the faulty video-recorded evidence tape and accompanying transcript impacted this testimony. Namely its intended purpose of aiding the witness in their memory of the events could how it could have been an adverse factor on their memory.

As described earlier, significant external factors contributed to the ‘flawed’ testimony of the child. The court did not address the excessive technical difficulties impairing the quality of the video-recorded evidence adequately enough. The court, and to a certain degree the Crown³³, did not consider or acknowledge how the technologically faulty evidence may have failed to aid the child witness effectively and may have alternatively been a deleterious source of confusion.

³³ It is not a requirement for the Crown to make an application to use video-recorded evidence for a child witness. Thus, the faulty technical difficulties of the video-recorded testimony and accompanying transcript were not necessary for the testimony of the child witness. See Bala et al., (2001).

This is in addition to the two years that had elapsed since the child witness had formally disclosed. In this way, the court's discretion and the justice system concerning delays, failed to recognize external factors contributing to a witness' confusion and should not impede on the consequent perception of their credibility. Furthermore, the child witness is invariably made aware of their position and relative status to adults, making matters even more complicated.

To depict an unreliable witness as one who lacks credibility as a result of incompetency without acknowledging these limiting external factors is a problem. There is an apparent disconnect of the justice systems' lack of awareness of a young witness' position. In addition to the constraints placed on their credibility due to their age, they are forced to go into a formalized space with rules, dictation, and actions, all of which fail to fully acknowledge and encourage the display of their autonomy and agency. Alternatively, it pigeon-holes their identity to justify and reinvigorate the perpetuated norms of, in this case, childhood, rather than the active status of a witness who has valid input. Furthermore, the lack of appropriate accountability of the faulty technically impaired video-recorded statement in analyzing the witness' credibility is hugely problematic. The confines of their testimony are not and *should* not be uniquely attributed to the presumed 'lack' of the child's capacity, especially when the justice process has failures of its own. It is thus imperative to alternatively question and challenge how the justice system and its formalized process contribute to a child's '(in)ability' to be a witness.

Police Interactions: The Pre-Trial Precarities

The folly of the justice system, especially the courtroom, had been preceded by the interactions with the investigating police officer for this case. Interestingly, the statement taken from both the child witness and the accused had flags of inappropriate questioning by the court. For the accused in particular, there was an issue of voluntariness based on some of the police

officer's language during their interrogation with the accused which negated 20 pages of the final transcript (*R v AS 2018*, para 8). Accordingly, the court agreed with the defence's submissions that there were inducements made to the accused during the later points of the interrogation, which made it hard to refute that the statements made were voluntary. Similarly, for the child witness, the court made a note in their final reasons for judgements by flagging "leading questions" put forward by the interrogating police officer during the first formal disclosure (para 34).

In the court's view, the police officer had introduced the term "bathing suit covers" when following up about where the nature of the touching had occurred when the child witness had not referred to those areas with that term before (para 29). Furthermore, the court notes another instance the police officer had used a leading question when they had asked: "...was it under your jeans but above your underwear...?" (para 34). What is particularly interesting is the tendency of the court to make a note of these particular instances of inappropriate questions by the police officer but does not afford the same treatment to the counsels. More specifically, the defence, when asking similar leading questions introduced in the second example included above (see page 116), and those I dissect in chapter three were not flagged. This inconsistency raises the possibility that the court only flags certain questions by certain parties are flagged over others. While the roles of police officers and defence counsels are different such that the former must provide an impartial re-telling events, it begs the question of what the statute of limitation is for latter to not be given the same restrictions of police officers. Alternatively, it could be a point to mention that some judges' enhanced awareness over others helps them flag certain leading questions more readily. Accordingly, for this judge, the instances of how nuanced option-posing and negative polarity questions analyzed in the third chapter are significant issues

may otherwise be viewed as less problematic or a non-issue. This discrepancy is intriguing because it casts a shadow on the repertoire made known by the court that presided over this case concerning their wealth of experience with these particular cases.

Before the testimony of the child, the first day of this trial was predicated on the questioning of the investigating police officer and their interaction with the accused. As described earlier, it was concluded that the final twenty pages of the transcript were inadmissible for evidence. In the closing remarks for this day, the court had highlighted that both counsels had missed a particular instance of inappropriate questioning made by the police officer to the accused. In describing the challenges of appropriate questioning, the court mentions their repertoire and the required careful conduct of cases involving child witnesses as they state:

“These are tough interviews. I mean, as you all know, I used – or maybe you don’t. I used to be head of the Toronto Children’s Child Abuse Team before I became a judge 21 years ago. I worked in this area almost every single day. It’s something, it’s important work, but these pre-charge interviews are crucial, how they’re done, and it’s crucial how the interviews with the complainant’s are done. It’s tough work and people have to be very skilled. That’s why they have special units to do the work.”

The statements made by the court above are undoubtedly correct in just how “crucial” the pre-trial interviews are, given the rigorous process of court procedures. The necessity of proficiency and precise interview skills while carefully avoiding the boundaries of what is deemed appropriate questioning practices seem established and accurate, based on the court’s account when done correctly. However, this particular case presented these rules as ambiguous and a matter of individual interpretation. For example, a component of the police interview with the child witness explored the finer details of the kiss that had transpired with the accused. More

specifically, the police officer had asked whether or not they remember if the accused's mouth was open or not during the kiss with the child witness. This question was in response to the child witness stating that they felt the accused's tongue in their mouth. It is unknown whether or not this is standard protocol to ask a complainant whether or not they can remember if the accused's mouth was open or closed during a kiss. Furthermore, it is unknown why this is particularly relevant information for the disclosure process, or flagged as inappropriate all together. While these questions may have seemed harmless from the police officer's standpoint, it was a significant source of confusion for the child witness during their testimony at trial.

As elucidated in the previous chapter, the defence counsel had taken particular issue with the child witness' inability to recall or understand whether or not the accused's mouth was open or closed when the kiss happened. It contributed to the overall allure that the child witness had significant memory issues about the kiss and used this against them as a flaw accredited to their inconsistencies. The introduction of the 'mouth open or closed' query opened up the possibility of capitalizing on the lack of access to memory or knowledge on a technicality. The defence capitalizes on this in their final submission as the court noted: "[t]he Defence submits that F.S.'s inconsistencies were not minor. For example, F.S. could not be specific about the alleged kiss; when asked if A.S. kissed her with an open mouth and tongue or a closed mouth, F.S. said she was not sure and also that she did not remember." (*R v AS 2018*, para 75). The questioning about this kiss included in this analysis didn't necessarily indicate the child did not remember, but that they remembered "most of it" (See page 83). Furthermore, demonstrated indications of not understanding the schematics of a kiss, not that it did not happen. It is interesting how the court and defense paradoxically treat the child witness as impressionable at times yet presumes that they must know the schematics of a kiss. Although it cannot be known, it may be of particular

use to consider the hypothetical question for an alternative outcome of this scenario. What if the police officer had avoided asking this peripheral detail question about the kiss? Furthermore, based on the formal structure of the police interview process with child victims, how could this instance have been avoided?

Interestingly, the protocol for the particular unit that the child witness' interview took place at, the Child Sexual Assault and Abuse Unit (CASA), involves the oversight of Children's Aid Society (CAS) in a separate room. In their testimony, the detective stated that CAS' presence was protocol to avoid additional interviews to protect the interests and mental energy of the child. However, according to the transcript, there were no indications of any interruptions made by CAS to flag *any* questions deemed inappropriate or problematic during the interview with the witness. This was an intriguing outcome as there is past literature to suggest victim services and police services working in tandem together can come with its restrictions (Spencer & Patterson, 2016). In particular, there has been evidence to suggest that there is a level of disconnect between how victim services believe police should question a victim compared to how the interrogating police officer chooses to question the witness. As a result, there has been a call among some scholars who advocate for a better integrated multi-disciplinary teams as well as mediators to help divert these questions with substantial consequences.

While there is no formally recognized name for it, Multi-Disciplinary Teams (MDTs), Multi-Agency Investigation and Support Teams (MIST) have been introduced in other countries such as Australia and the US to help ease the interview process with child victims (Herbert & Bromfield; 2019; Herbert & Bromfield, 2020). The purpose of these teams is to involve as many agencies needed in one full sweep during the intake of the child victims' details of abuse in one single sitting or interview. The stakeholders most often involve the police, child protection

services, mental and medical health services. These shared results of the interviews are structured to support the child witness during their disclosure while avoiding unnecessary added trauma to the pre-trial process. Unfortunately, while these teams intend to mitigate the conflicting effects of multiple interviews, they do little to address the problems of inappropriate questioning both in the pre-trial and trial phase of the process.

Child witnesses are thus still subject to unnecessary forms of questioning practices and tactics which still contribute to the stress and anxiety advocated amongst past victims (Hurley, 2015; Randell et al., 2017). As displayed in earlier discussions in the previous chapter and this current one, the consequences of cross-examinations in particular present the greatest challenge of providing the most appropriate answer to the most frustrating and challenging questions. From the moment of their first instance of questioning by police officers to the trial process by counsels, an evident problem in this particular case for the child witness was the lack of appropriate intervention or *prevention*. As a result of these ongoing experiences, in addition to this present case, countries with similar adversarial justice systems, such as South Africa, England and Wales, and Australia and others, have introduced reforms and implemented amendments to accommodate young and vulnerable witnesses with alternative testimonial aids during the questioning process to Canada (Cooper & Mattison, 2017).

More Testimonial Aids: International Perspectives

One of these aids comes in the form of intermediaries whose primary function is to serve as an impartial third party ‘translator’ who acts as a gradient between the counsel and the vulnerable witness to ensure effective communication that leaves both parties on a similar intellectual level (Intermediaries for Justice, 2020). This program has been increasingly successful in countries that have implemented their versions of this provision in Australia, New

Zealand, South Africa³⁴, and England and Wales (Collins, Harker, & Antonopoulos, 2016).

Additionally, some of these countries have also implemented provisions that provide judges with the discretion to intervene when counsels ask inappropriate questions that contravene the codified guidelines outlined in their respective legislation (Jordan, 2014). This provision seeks to afford young witnesses with the accessibility in court to exert their right to participation while ensuring that the questions they answer are informed and do not undermine their agency.

However, Canada has not followed in these the same steps despite evident disparities outlined in ongoing social science research, including the discussions levied in this analysis.

At face value, intermediaries could be a potential solution to the problem of inappropriate questioning used to examine the evidence of child witnesses in Canada. Any new introduction of testimonial aids focused on centering the experiences of victims may be met with some resistance by some adjudicators as it has in the past (see Bala et al., 2001). However, Canada should still consider piloting this program given its success in other adversarial justice systems (Caruso & Cross, 2012).

The role of the intermediary can vary within each jurisdiction; however, their fundamental purpose as mediators underscores the services that they provide for the child witness. For example, registered Intermediaries (RIs) in England and Wales conduct linguistic assessments, including grammar, concepts of time, and responses to certain questions. Additionally, they assess personality differences among each witness, including their attention span, listening abilities, and possible gaps in comprehension (Collins & Krahenbuhl, 2020). This model embodies an individualized approach for each child witness to encounter appropriate questioning practices tailored to their specific needs during the police interview. Additionally,

³⁴ See Fambasayi and Koraan (2018) and Bekink (2019) for an in-depth discussion of the use of intermediaries in adversarial practice in South Africa.

they create a file of their findings to the judge and both counsels before the trial commences for an agreed-upon questioning scheme that both counsels must follow to ensure fairness.

Experimental research has shown to support its beneficial interventions in pre-trial processes, such as navigating offender line-ups and mock interviews with both typically developing children and those with autism spectrum disorder (Henry et al., 2017; Wilcock et al., 2018).

However, there is no substantial research on the experiences child witnesses *themselves* describe if an intermediary was present during their testimony. This thesis also recognizes that the possible introduction of an intermediary, an additional professional adult, may present an added power imbalance for the child witness.

The promotion of intermediaries for a possible reform to the testimonial aid process could be a justification to involve another adult the child witness interacts with who are beholden with a higher epistemic authority than them. They would also have the power to intervene and unilaterally determine what is linguistically appropriate for each particular child witness which, if not done properly, could be another way to silence the child or limit their existing autonomy and competency as a social agent. This could be an additional role in the justice system that perpetuates the identity of the child witness as more inferior to adults and may not serve to directly benefit their agency in the way intermediaries are intended to. As this particular case has shown, very well-intentioned testimonial aids such as video-recorded evidence resulted in immense complications for the outcomes of the child witness' testimony. As such, it is imperative to be hyper-vigilant in introducing further reforms without evaluating both its benefits and its possible limitations.

In Canada, few advocates are outspoken about the possible introduction of intermediaries to continue to mitigate the current issues persistent in the challenges cross-examinations present

for younger witnesses. Elsewhere, advocates in England have highlighted the experiential benefits RIs have had a positive impact on accommodating children during forensic interviews with police and their testimony at trial (Williams, 2018). These positive outcomes are highly regarded by police services, victim services, as well as past witnesses' guardians which have resulted in a high demand of registered intermediaries in England and Wales. However, due to a lack of resources there has been a significant increase in month-long wait times to attain an intermediary. This is unsuitable for police services, in particular, who need to take a statement while the memories about the event from the child are freshest. RIs themselves in England and Wales, for example, have called for more resources to improve their training as well as legal professionals to be trained further (Collins & Krahenbuhl, 2020). Despite being established in their roles, RIs still report experiences of needing more judicial support as a source of validation and accompanying cooperation from the counsels. Their greatest concern is that their recommendations get followed through emphasizing a need for judicial legitimacy during proceedings.

These discussions about existing RI programs in other adversarial justice systems demonstrate that an alternative existing testimonial aid similarly require more tweaks to continue to become more efficient for the child witness and the carrying out of justice. For Canada, the path to approach the intermediary route is absent. It is also important to consider ongoing debates surrounding the proficiency of reform for our criminal justice system. Furthermore, there is dissonance between the intentions and the consequences of unintended outcomes from successful sexual assault reforms. The following section seeks to explore these debates and frame the issues faced by child witness in this case to contemplate if reform is both foreseeable and feasible in this regard.

Reforms, Reforms, Reforms: Do They Reconstitute or Reify the Norms?

For decades, the critiques of reforms and the overall justice process for victims are documented and ongoing. There has been a consistent struggle for those advocating for victims' rights and a greater recognition of their agency which has been met with pushback from those who defend the justice system. Among these defenders are those who consistently attest that it's the offender's trial and not the witness' (Bala, 2001). As an added consequence of their age, the battle for visibility of child witnesses as competent social agents has been a battle less explored by most. Indeed, many critiques of the justice system and its failure to accommodate victims has been most heavily highlighted by intersectional feminists and prison abolitionist advocates with different motivations that share similar goals. While few address children's unique needs for their right not to be silenced due to their relational position compared to adults, discourses such as these share relevant explorations that could benefit the child witness and victim paradigm. As such, I will briefly digress in the following section to explore these discourses that critique the justice systems approach and its failures to accommodate witnesses appropriately.

Outcomes of a Victims' Testimony: Justice or Just Enough?

Testimonial barriers faced by victims speak to a broader issue outside of those imposed upon this particular child witness. There has been consistent discourse surrounding the criminal justice system and its ineptitude to address the needs and wishes of victims. For feminist scholars, the defective interrogative tactics of counsels are argued to be rooted in patriarchal, paternalistic, and misogynistic rhetoric (Taylor, 2018). Naturally, these restrictive origins have been a locus of struggle for women, men *and* children in varied representations of perceived ideologies and consequent identities (Thunberg & Bruck, 2020). In recent decades, there has been a push for ways to address these issues, some of which involve working *within* the system

to improve the experiences of witnesses with further reforms. Contrastingly, others engage in alternative forms of justice *without* the institution of the criminal court. Given the outcomes of the discussions about challenges victims face described in the previous chapter and earlier sections of this current chapter, a brief exploration of the two proposed solutions is worthy of gaining insight for future steps to promote child victim agency and autonomy as witnesses.

On the side of advocacy for further reforms, there has been consistent discord among feminist scholars who, whether intentionally or not, argue for increased incarceration, deemed ‘carceral feminists’. Alternatively, others align with prison abolitionist goals, such as intersectional feminist scholars who seek alternatives to incarceration of offenders, deemed ‘anti-carceral feminists’. For the sake of time, this discussion will focus primarily on the outcomes of reform in Canada concerning this debate.

The particular push for sexual assault reform stemmed from a need to transform the problematic ideologies perpetuated by the justice system, including its damaging effects on the complainants of sexual assault trials (Craig, 2018; Taylor, 2018). Craig (2018) highlights the self-perpetuating feelings of shame and self-blame experienced by victims that occur regardless of how sexual assault trials progress. This outcome is attributed to the conduct of lawyers in their questioning practice and their tendency to infuse gender-stereotypes in their language. Furthermore, their conduct is argued to re-constitute these problematic ideologies’ validity while compounding the victims’ existing self-depreciative feelings³⁵. Craig applies a substantive critical analysis to the harms implicated on sexual assault complainants in their trials by highlighting the varied ways the Crown, defence and judge’s roles all uniquely contribute to the

³⁵ For an in-depth critical discourse analysis of how these discursive questioning practices embody and materialize in realistic settings that continue to deny the agency of (adult) sexual assault victims, see Ehrlich (2001) and Craig (2018).

stereotypical and at times unethical treatment of victims in their pursuit of justice. While necessary to shed light on the wrongdoings and harms imposed on victims by the adjudicators of the criminal justice system, Craig only offers solutions that continue to uphold the ostensible integrity of the justice system as society's *only* option to respond to sexual violence. While Craig does address the well-intended but less than optimal reforms concerning sexual assault, there is little consideration of scrutinizing the very justice system itself and its unwavering tendencies to punish convicted offenders and the victims themselves.

Other perspectives entertain that training legal professionals and reforms will do little to alter the embedded structural barriers of the justice system. Craig appropriately addresses that reforms have done little to improve the culture of reporting, mitigate the fears victims have of the justice system, or its lack of rejection of stereotypes. However, scholars such as McNabb and Baker (2021) and Caruso and Cross (2012) describe the ills of bureaucratized reforms. In particular, the justice system and related institutions are yet to rectify the snail-pace of reforms that prolongs the immediacy of resolve within the justice system to address the ongoing needs of complainants. Furthermore, within this bureaucratized 'policy cycle', reforms fail to address the intended problems they seek to fix. For example, issues such as Bill C-51 regarding the 'rape shield' still face amendments that still miss the mark of diminishing rape myths and sexist stereotypes during trials (See McNabb & Baker, 2021). These bureaucratic barriers of institutions with rigorous indoctrinated rules and practice are a source of motivation for anti-carceral feminist scholars and prison abolitionist advocates for several reasons. Of importance to this particular discussion are the alternative solutions to the 'criminal punishment system' shifting focus towards transformative justice.

Western societies are ingrained to believe that the natural order of criminal consequence comes with justice in the form of a guilty charge and imprisonment of the offender. Anti-carceral feminists and prison abolitionists challenge this commonsense solution by highlighting the disproportionate targeting of certain marginalized groups, the inhumane treatment of offenders in the prison systems themselves, and the lack of justice felt by the victims regardless of the verdict (Taylor, 2018). Taylor (2018) particularly argues that the prison systems reinforce the culture of rape and homophobia, which is counterintuitive to the goals of anti-rape feminists. Furthermore, there is tremendous evidence that suggests an overwhelming dissatisfaction of witnesses, leaving them with the lasting outcomes of their respective trials (Craig, 2018). Indeed, Taylor (2018) argues that there is a lack of accountability when solely focusing on the perpetrator. It perpetuates the institutionalized silencing of victims by forcing them to adapt to the legal discourse. Furthermore, she argues that this does little to address the underlying stereotypes and ideologies that disseminate inside and outside the courtroom. Taylor thus alternatively argues for a counter-hegemonic solution, that is, transformative justice, that has the potential to address these ongoing inadequacies of the 'criminal punishment system'.

Transformative justice represents a victim-centred approach to seek accountability of the perpetrators, surrounding community and advocates for the recognition of dignity and respect for the victims (Taylor, 2018). In a broad sense, transformative justice models are configured in a format that varies depending on the specific goals of the grassroots organizations that practice it. The basic framework, however, operates in with a united goal to focus on the victim. Typically conducted in a community oriented tribunal, these organizations facilitate the space for victims to speak about the harms the perpetrator committed against them. Members of the community and the perpetrator(s) are encouraged to listen to the victim's story. It provides the victim with

the autonomy to speak about their harms and trauma on their terms without bureaucratic formulaic questioning practices and are intended to be void of unnecessary additional harm. The goals of these tribunals are to understand how each individual directly or indirectly contributed or allowed for this harmful event to occur. It aims to disseminate the accountability onto community members in addition to the perpetrator(s) themselves with the ultimate goal to ensure these events never happen again. Transformative justice currently operates through grassroots organizations in US cities such as Seattle and Oakland which cater to specific goals important to the organization.

A case study highlighted by Taylor considers an organization named Generation FIVE whose aim is to eradicate child sexual abuse in five generations through the vehicle of transformative justice. The process exclusively aims to empower young victims, focus on who perpetrated the harms, and how the community contributed to such harms by not positioning themselves in a way to respond and prevent it. The solutions involve the perpetrator hearing the victim's perspective, reparations, apologies, commitments to stopping harmful behaviour, self-transformation commitment, and group efforts towards shifting power imbalances. Of particular importance to this research highlighted within this organization is their recognition for the pervasive 'adultism' within communities. They define 'adultism' as "...the widespread disempowerment of young people in society, which reinforces children's and young people's vulnerability to sexual abuse" (p.45). Generation FIVE argues that it contributes to the unequal power systems that allow for this violence to perpetuate. The relevance of their perspective lies in several truths that emerged in this particular case of a child witness.

The model of transformative justice addresses some root causes of violence that the criminal justice system cannot account for and in some ways continues to re-constitute. While

recent and indeed not perfect, the transformative justice option offers the potential to produce a new accountability mechanism that does not produce more harm to human beings (Taylor, 2018). This approach counters the justice system, which does little to address the root problems such as rape myths, sexist and gendered stereotypes, and the confounds of 'adultism'. Furthermore, while in need of improvements, the transformative justice outcomes do not come close to the adverse consequences of the current structure of the criminal justice system. It is an alternative to truth-seeking that does not involve the contemplation and berating of the victim rooted in stereotypical ideology. It offers a more humane approach that directs resources to communities instead of institutions that continue to dissuade sexual harms and violence inadequately. However, an area of contention among its critics address the issue of allowing an offender to walk free. While the transformative justice approach predicates the victim's wishes, some may wish not to see their offender walk freely due to their ongoing experiences of trauma. Additionally, in seriously violent cases, there is certainly the possibility of an offender posing a constant danger to community members and the victim(s).

These valid concerns speak to the deeply complex issue of sexual violence. Both explorations of reforming the current justice systems while considering its alternatives represent multiple truths that both systems cannot holistically account for. These truths include that children can experience sexual assault and there is both validities to their experience and that those who commit those crimes are morally and ethically wrong for doing so. It is realistically possible that the justice system may not validate their experiences due to a lack of appropriate strategy by the Crown, the conduct of the defense, or the verdict made by the court (Craig, 2018). It is also similarly true that the justice system cannot account for 'gray areas' and does little to deter or eradicate sexual assault of children. For this particular case, the Crown could not

convince the court beyond a reasonable doubt that the accused should be sentenced due to several technicalities that the rigid testimonial format elicited from the child witness' version of events. This conclusion neither holistically confirms or denies that the events in question happened to the child witness or not.

Consequently, there is no *true* resolution. The court's decision also represents an understanding of the gravity the criminal justice system's carceral consequence permits. This may be, in part, due to the lack of substantial rehabilitative procedures within prison systems that can help to deter this behaviour if that is ultimately the goal (Taylor, 2018). It is also true that there is a disproportionate treatment of offenders whereby some appear to be more liable than others which engage in intersectional issues of the justice system (Taylor, 2018). It is also realistically potential that offenders present an ongoing risk to society that permits possible dangers that a community conversation alone cannot fix. Furthermore, transformative justice mechanisms cannot guarantee that the offender will take specific accountability for the harms done to another individual, despite being held accountable in other regards such revoking their position of authority (Taylor, 2018). Thus, each solution has its caveats along with its validities.

As it currently stands, the protective-driven impetus of legislation to promote the 'safety' of victims continues to be the most common way forward. As such, while this thesis appreciates the solutions and success a transformative justice could offer, as a mediating point, however, it is perhaps useful to consider ways to integrate solutions proposed both by the ongoing reforms for the criminal justice system and some of the main pillars of the transformative justice approach. The following section will necessitate the overwhelming need to empower victims' voices and those of children who face the juxtaposition of being both a victim and a member of the most vulnerable class in society.

Future Landscapes for the Courtroom: Balancing Participation and Protection

For child witnesses in particular, reforms and research continue to impose barriers on the substantive participation and empowerment of their voices. The transformative justice approach practiced by Generation FIVE recognizes the hierarchy of power that imposes the leveraged status of adults to take advantage of younger people who are disempowered and disregarded in several respects. As discussed in chapter two, many scholars amongst childhood studies who recognize the need of a child's voice and perspective in matters that concern them more heavily than they are enabled to do so (Leonard, 2015; McNamee, 2016; Wall, 2010). Furthermore, as discussed in chapter three, children can be recognized as social agents without fortifying the rigidity of child-like qualities that diminish their epistemic authority. The gap that this thesis distinguishes persists at the lifeworld level of the child.

According to Cassidy and colleagues (2017), children recognize their second rank role in the family and in schools in relation to the adults that conduct and dominate these spaces. However, they argue that this runs the risk of extrapolating to broader society, diminishing the opportunity for children to speak on matters that could concern or interest them, which continues to reflect the needs of interests articulated by adults. Through a rights-based critical analysis, the authors thus argue that the overemphasis of protective rights and provisions such as those outlined in the UNCRC are helpful to a certain degree but has its limits. Accordingly, they put forward a need for a more emancipatory or liberationist view. The restrictiveness of the protective or patriarchal stance has its limitations in establishing a need of children's participation in decision-making within social and political spheres. This emancipatory perspective could alternatively contribute to the position of the child's status into a more impactful role that empowers their voice and their input. An increase in youth-directed activism

exists in several research domains, such as child labour and youth advisory councils (See Bendo, 2016, McNamee, 2016; O'Connor, 2013). Given the outcomes of protection-based reforms and legislation concerning children and young people have unintended consequences, I provide a deliberation of the benefits to adequately amplify the child's voice to inform policy.

As a final consideration, this thesis grapples with why we reformers, advocates, and researchers refrain from simply asking the children about what they need from the justice system? Past researchers have highlighted an accessibility issue to gain access to the perspective of children due to rigorous ethical considerations and procedures, making this process challenging.³⁶ However, there are instances where emancipatory and liberationist views have successfully challenged the implications of protection-based provisions. Specifically, youth advisory councils are an area that empowers children are empowered to articulate their concerns and needs regarding their lifeworlds.³⁷

O'Connor (2013) displayed how young participants felt empowered to have their voices heard on issues that mattered to them. However, without the validation of adults, they were discouraged by the lack of adequate support diminishing their access to a substantive role in effecting change. These restrictions speak to a larger issue of the adult dismissal of appropriate allocation of lending their vocational powers to young individuals who demonstrate an established sense of autonomy, competency and agency. The performative nature of participation platforms of children in both public policy and the courtroom ultimately relies on this pre-disposed inclination to deny the child the status of a social agent with substantial input and self-awareness about matters that concern them.

³⁶ See Chapter 2 for a larger discussion on the ethical restrictions of engaging with child participants.

³⁷ For an in-depth analysis and overview of perspectives, outcomes, and challenges of youth advisory councils in Canada, see Bendo (2016).

I contend that there certainly is a way to recognize a child's agency in any respect while still appreciating the need for their protection, given their lack of political status and dependency on adults. This dependency, however, should not overshadow their values, perspectives, and experiences. Accordingly, the advocacy of reforms should consider the views of child victims in a similar way that they do for adult victims that recognizes their capacity and agency. I suggest that the challenge of doing so relies on the shoulders of scholars, advocates, parliamentarians, and adjudicators alike to reject the 'adulthood' biases within the justice system and recognize how it negatively impacts their youngest victims and their visibility as competent social agents.

Past research demonstrates how adult practitioners may be surprised to find that the insight of a younger perspective produces alternative solutions that may be most beneficial or may share the goals of the adult agenda (Crowley, 2015). Furthermore, it is possible to empower the child in suitable ways by facilitating a space for them to articulate *their* needs from the justice system rather than adults presumptively formulating their needs for them. Institutions such as the justice system continue to *slowly* be re-morphed and re-invigorated by bureaucratized processes that recognize its inadequacies to make the system better. Regardless of this recognition, this very institution, as demonstrated in the previous chapter and this current one, evidently has gaps that reflect their lack of grasp on the *realistic* condition of the child. That is, no child is the same, and the confines of their assumptions of childhood impose augmented barriers to their testimonies and well-being.

Furthermore, there is an increased need to evaluate of how testimonial aids both help and hinder child witness' credibility. It is indeed long overdue for the justice system to similarly recognize that protection and participation do not need to be mutually exclusive. Moreover, adjudicators must take the propensity of the assumptions of childhood more seriously for visible

change in the treatment of child victims. It is the unrestricted truth that child witnesses are qualified and, when given the space to do so, *can* receive protection and feel empowered to vocalize their experiences.

CHAPTER FIVE: CONCLUSION

The outcomes of reforming the justice system to involve and protect child witnesses in Canada have significantly shifted over the past four decades. The goals of this thesis sought to evaluate how these changes have improved or hindered the testimonial experiences of child witnesses. In particular, it was a goal to discern what testimonial aids provide for a child witness during their testimony. Furthermore, it was a goal to demarcate whether conventional childhood characteristics would be present in the discourse of the adjudicators conducting the legal proceedings. Accordingly, it was a goal to discern whether the choice of linguistically complex language could serve to undermine the child witnesses' agency. Lastly, it was a goal to explore how this analysis' outcomes could help to justify or caution further legislative reform in Canada for young witnesses.

Through a critical discourse analysis with a particular focus on the constructions of narratives in institutional settings, this thesis applied an affixed lens of both newer sociologies of childhood and critical victimology to parse through the dialogue of a case transcript involving a child witness. The existing literature explored in chapter one details the challenges young witnesses face before, during and after they deliver their testimony. Most significantly, this thesis developed an understanding of the kinds of linguistically complex questions for child witnesses. Past research finds that questions, most often posed by the defence, that are closed-ended, suggestive, repetitive, and include peripheral details present the most significant challenges for child witnesses during a testimony (Andrews et al., 2015b; Andrews & Lamb, 2019; Szjoka et al., 2017). This thesis affirmed these findings in chapter three and detailed how counsels used these very questions to construct a narrative that presented the child as a less than credible and

reliable witness. While these forms of questions were still commonly used by the defence counsel, I also found that the Crown counsel used these questions to a lesser degree.

Furthermore, similar to past research, the court intervened relatively infrequently when these questions arose. This reluctance may partly be due to a lack of awareness of how these questions can be a challenge or an awareness of restricting the possibility of an appeal due to persistent intervention (See Westera et al., 2019). While the presence of the questions was noted due to their issues as a source of confusion, they were additionally analyzed to discern if they were infused with underlying motivations. To extend the existing body of literature, a notable gap that this thesis addresses is a lack of analysis discerning *why* these questions diminish the witness' credibility and further how the covert context of the questions served to diminish the child as a competent social agent.

The findings of this thesis presented a phenomenon of the ways assumptions of childhood substantively overshadowed the displays of autonomy, agency and competency of the child witness. I accordingly demonstrated the ensuing constraints of the exasperating process of institutional gaslighting. In various context-specific questions relating to stereotypical themes of impressionability, passivity, and innocence, characteristics which are often presumed to be intrinsic to every child, were used as justifiable reasons to doubt the testimony of the young witness. As such, their accompanying 'capacity' is predicated on these characteristics that are questionably assumed to be detrimental for this particular child witness. Chapter two describes the discrepancies and tendencies of both literature and practical spaces which continue to propagate these romanticized ideologies associated with childhood (McNamee, 2016; Weaver, 2019). Viewing the child witness as one who is in a deficit of capacity and capability, which is often the case in the courtroom given the discursive structures of legislation and practice (See

Criminal Code s. 16.1), was a substantial obstacle they could not overcome. As a result, this thesis was able to diverge further in the practice of questioning of the counsels, the court and police services.

Chapter three explores how the court concluded that the child witness was likely “honestly mistaken” about the events that had been alleged to occur by the accused. This thesis demonstrated how the defence and the court both authored the child-like identity of the child and used it as a justification to find that the accused not be found guilty by gaslighting the experiences of the witness. The court relied on the influence of the parents’ negative perception of the accused on the child witness revealing embedded assumptions of passivity and impressionability. The court further denied the truth of the events by stating that it was likely just child-like horse-play and tickling rather than an incidence of sexual touching. The defence counsel’s ability to re-contextualize the events and overemphasize the child-like identity of the witness served to benefit the goal for their case. Furthermore, they were able to diminish the autonomy and agency of the child witness. The court further necessitated this child-like identity by positioning greater epistemic authority on adult accounts and influencing the child’s own recollection without any similar evaluation of analysis of competency or plausibility. This thesis distinguished how despite these barriers, the child witness demonstrated displays of agency in their own ways.

The child witness demonstrated a clear understanding of their relational status compared to adults by describing how they were fearful of their parents not believing them. Furthermore, they demonstrated resistance to the defence counsel’s attempts to suggest that they were a liar and had a faulty memory about the events in question. The child witness was also well established in their social competency by explaining why they were hesitant in telling their older

sister what the accused, their then-boyfriend, had done. This thesis described that in spite of these specific displays of competency, agency and autonomy unique to the particular child witness, their resolve was eclipsed by child-like justifications and conclusions of what could have transpired to describe why they were likely “honestly mistaken”. Of particular importance found within this specific case was the presence and hindrances of testimonial aids.

Chapter four described how the amalgamation of the faulty video-recorded evidence, the conduct of the investigating police officer and the confounds of delays further de-prioritized the capacities of the child witness. The unique opportunity this thesis demonstrated through a case study examination was the overarching technical difficulties of the video-recorded evidence that muddled the clarity of the “heart of the allegations themselves”, as per the court’s final judgement (*R v AS 2018*, para 94). My findings demonstrated how the well-intentioned ‘protection-driven’ policies seek to effectively aid child witnesses contrarily in a source of confusion for all parties involved.

I explored alternative testimonial aids put forward in similar adversarial justice systems such as intermediaries, multi-disciplinary teams, and ground rules hearings to determine if this could help to mitigate this issue. I also reflected on whether reforms themselves can have adverse or unintended effects, as was the case for this particular child witness. The entirety of the findings this thesis offers a debate of whether or not it can justify further legislative reforms to accommodate child witnesses. It also explores whether the justice system has its limits in its capacity to evolve. Furthermore, in so doing, it poses the question of whether or not reforms further reify protection-driven policies that overlook underlying assumptions and ideologies of children, in particular, that serve to diminish their position as competent social agents.

My thesis affirms that this particular case fell victim to the entrapment of these assumptions in addition to the follies of testimonial aids and juristic practice. Since there is a lack of literature that explores these confounds, it is essential to urge future research to divest in these confluences to determine how much of an issue this may be to a larger scale. Canadian-specific literature needs this most especially. My case study was the first to apply newer sociologies of childhood and critical victimology and evaluate the usefulness of testimonial aids and elucidate the underlying discourses and assumptions associated with child witnesses in their role to deliver testimonial evidence in Canada. Since this is a case study, however, a sizeable limitation lies in its inability to determine whether these issues are prevalent in other cases that involve child witnesses.

For future research, it is thus necessary to discern further benefits or issues within the justice system overlooked in the past with larger sample sizes. Moreover, future research should explore the extent of technical difficulties resulting from s.715.1 in other child witness cases and how this impacts testimony on a broader scale. Finally, given the outcomes of this particular case, it would be insightful to see how significant of an issue this may be for other child witnesses or vulnerable witness who can use this testimonial aid in future research.

An essential revelation within this thesis was the archetypical fashion of counsels and their habitus within the courtroom. However, a limitation of this thesis was its inability to confirm whether or not the counsels, in this case, are trained in best practice interviewing techniques. There is no recent available Canadian data to contextualize the training of counsels when dealing with child witnesses, if at all. The evidence found in this thesis supports the notion that inappropriate question forms and contexts were present throughout the cross-examination and, to a lesser degree, the examination. Accordingly, it is suggested for further research to

continue to probe the training process involved with counsels and what this process entails. This future research could consider the varying roles of counsels while still applying a greater level of scrutiny on what kinds of questions are currently permitted and evaluate the efficacy of these questions. Furthermore, I urge future research to divest in the ethics of questioning child witnesses, mainly to decipher whether an imposition of a formal ethics process, similar to those researchers endure, be applied to counsels who engage with child witnesses.

On the perspectives of the arbiters of justice who engage with child witnesses, there is little recent research in Canada that draws on the experiences of defence and Crown counsels who are willing to share their views. Future research could consider their positions, attitudes, perspectives and experiences with child witnesses. Such insight could provide a roadmap for research and the possibility of formalizing a training process for all counsels that take on child witnesses during their examinations. Alternatively, I suggest piloting additional testimonial aids and alternative justice options to explore within the Canadian context to discern if further reforms within the justice system are needed.

As was discussed in the fourth chapter and briefly in the first chapter, this thesis explored options that could address what some scholars call ‘acontextual approaches’ concerning the treatment of child victims and their accommodations. In particular, intermediaries and ground rules hearings conform to arguments put forward by Holloway and Valentine (2000) and Fellin and Callaghan (2017). These additions address the discrepancy that there can only be one kind of childhood, and accordingly a specific archetype of characteristic that encompass every child. In so doing, this then recognizes that childhoods and those it enraptures are not ubiquitous in nature or in character. There is a lack of Canadian literature to support the piloting of these testimonial

aids and should thus be a focus of future research to explore its feasibility and applicability to our justice system.

In alignment with the lack of individualized treatment, another limitation of the structure of the justice system and its accommodations for neurodivergent victims is not very prevalent in existing research. Consequently, this was a limitation this thesis could not address. Determining the accessibility and plausibility of the process involved with those who may be non-verbal or limited in their verbal communication needs to be explored. The accessibility of the justice system remains a challenge for neurotypical individuals, as was explored presently in this thesis in addition to past research (See Collins, 2018, Erlrich 2001, Taylor, 2018). Accordingly, the justice system's upper limits to account for these individuals continues to be an ongoing issue to be addressed.

As a possible alternative, this thesis also explored transformative justice options for child witnesses. This unconventional justice-seeking vehicle could adhere to the suggestions and arguments inherent in critical victimology as victim-centred approaches call for the awareness of negative assumptions and treatment of victims throughout the justice process. Future research could address these alternatives to probe how this approach could benefit cases that fall into "gray areas" such as the one explored in this thesis. Unfortunately, there is little to no research in the Canadian context concerning past child witnesses' lived experiences and realities at an individual and personal level. There is an imminent need to continue to heed advice and insight from those who directly interact with the justice system. Due to the tedious ethical process, this thesis was limited in its ability to provide the lived insights of the child victim themselves which diminishes their perceptions of the case I analyzed. Thus, my analysis cannot and should not speak for those whose stories were told here in this discussion.

Premonitions and research without these perspectives have an upper limit and do not address these experiences head-on. Drawing on the lived experiences of those who are willing to contribute to better the experiences of the victims/witnesses/survivors that come after them serves to clarify the nuances of the effects of the justice system that case transcripts alone cannot account for. Similar to the pioneering work done by Hurley (2015), future research is thus obliged to continue drawing on the experiences of these individuals in Canada to determine how the justice system can accommodate them more appropriately and adequately.

In its entirety, this thesis' contributions shed light on the presence of complexities embedded within legal discourse at both the theoretical and practical levels. This thesis provided a singular example among many of how formidable a child is despite the boundaries the social structures adults create around and incidentally against them are. The arguments embedded within this thesis reflect the necessary position needed to continue to amplify the voices of victims and challenge the restrictive ideologies that silence and diminish their opportunities to present their truths and seek justice. As a final reflective point, I wish to revisit my interpretation of institutional gaslighting and the necessary scrutiny it levies against the criminal justice system. It is essential for this thesis to conclude by shifting focus to the realities of the victim predicated by the goals of truth-seeking towards a new meaning of justice. Going forward, I encourage a departure from reservations that lead us to fear the unknown and proceed with unabridged imagination.

As deduced in my second chapter, the entire foundation of affixing witnessing and testimony is less elementary than the criminal justice system depicts. My earlier discussions of Agamben (2009) and his critiques of the justice system and the lacuna of the testimony, Taylor's (2018) exploration of the transformative justice option and, my establishment of the dissonance

between agency and the witness, not absent from the victim, but made possible by the justice system are relevant for further contemplation. In several ways, we put forward the idea of how brittle the foundation of “truth-seeking” lies in the justice system when we challenge the goals of its arbiters and the aftermath of its destruction. For witnesses, in particular, all indicators made visible by their voices due to prior research and this specific case, point in the opposite direction of truth-seeking the justice system provides.

There are inevitable losses to nuances of story and experience that continue to decay as time distances itself from the event. Agamben (2009) sources an inevitable loss to the truth of the event since the stories of some cannot be articulated due to the literal loss of their voice as a consequence of death. However, those who witness and survive deal with their experiences and trauma-related wounds through unmediated discourse and consequently, the only link that lends itself to its existence. Agamben urges a reflection of what language can and cannot articulate, something with which the criminal ‘judgment’ system does not fully acknowledge. To do away with the zero-sum memory requirement the justice system necessitates for its victims is to explore less formalized techniques to address the lacuna of witness and testimony. In so doing, this unabridged discourse enables an opportunity to traverse the individual experience to the collective. It helps us bear witness to what we did not experience by focusing on the witness’ experience.

Accordingly, discussions of transformative justice Taylor (2018) provides for young victims is an opportunity to remedy the social harms in a similar way that shifts blame onto the perpetrator *and* the collective. By *listening* to the victim, we engage in a method that empowers their voice and what they can speak to about the traumatic event in a way that recognizes their existing agency. This option urges us as a collective to shift blame not only onto the perpetrator

but also to the environment we take part in that enabled these harms to occur. In this way we could then lessen the fear of the carceral consequence and its intersectional issues and take accountability and responsibility by reflecting on the ideologies and stereotypes we uphold to further prevent the harms against these individuals. In doing so, the constraints of institutional gaslighting would no longer shame, diminish, or undermine the victim and their experiences. It humanizes victims and legitimizes their experiences in an ethical and moral way. Discourses that reify misogyny, homophobia, paternalisms, and adultism no longer serve as an excuse to shift culpability away from the collective and the perpetrator. The undue harm precipitated by our collective propensity to legitimize the legal vehicles that abstain from such accountability and responsibility is our first point of departure if our goal is to seek true resolve for our victims.

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Appendices

Appendix A: Question Types & Formulations³⁸

Question type	Question subtypes	Example
Appropriate (open-ended) questions		
	Invitations (free recall)	The use of questions to cue context or to use as a method of follow-up: e.g., “Tell me in your own words what happened.”
	Directives	The use of questions beginning with WH-: e.g., “Who was on the bed with you that day?”
	Central Details	Plot relevant details: e.g., “Where did the accused touch you?”
Inappropriate (closed-ended) Questions and Formulations		
	Suggestive	Questions or propositions that suggest the actions or motives of the witness: e.g., “Are you lying?”
	Peripheral Details	Asking questions about details that are not relevant to the plot: e.g., emotions or thoughts about the event in question or descriptions of the time and place. E.g., “What season was it when this occurred?”
	Option-posing	Asking a question that can only have one of two answers posed: e.g., “Which is it, you couldn’t remember or you did remember...?”
	Negative Polarity	Involves the use of ‘all or nothing’ language with words such as ‘never’, ‘ever’, and ‘always’: e.g., “Have you ever lied to your parents before?”
	Interruptions	When the witness is interrupted or unable to finish their thought.
	Multiple Questions	Instances where multiple questions are asked without pauses for a response to each question in one turn of speaking: e.g., “Was he usually tired? Would he come talk to you?”
Institutional Interview Storytelling		

³⁸ The following classifications are derived from previous research. Please see Andrews and Lamb (2017), Andrews and Lamb (2019), Andrews, Lyon and Lamb (2015b), Baraldi (2019), De Fina and Georgakopoulou (2012), Denne et al., (2019), Szojka et al., (2017).

	Entextualization	Extracting particular discourse out of context and presenting it in a newer context to portray a new interpretation
	Re-contextualization	Involves the possibility of one party to create significance in a particular element to make a certain narrative acceptable within that same context.

Appendix B: Coding Framework

Accused's Statement

Identity Construction of a Child Witness

- Activities of a Child
- Agency
 - o Awareness of Adult Behaviour
 - o Awareness of Others (social competence)
 - o Plausibility of story
 - o Responses to Confusing Questions
- Child-Directed Control of Narrative
- Child's Expressed Feelings
- Competence and Understanding
- Spatialized of Child-like Spaces
- Honesty
- Impressionability
- Inconsistency
- Interactions with the Accused
- Passivity and Innocence

Identity of the Accused

Linguistic Variance and Use of Language

- Appropriate Questioning
 - o Central Details
 - o Free-recall questions
 - o Directives
- 'I Don't Remember' (IDR)
- Inappropriate Questioning
 - o Interruptions
 - o Multiple Questions
 - o Negative Polarity
 - o Option-posing
 - o Peripheral details
 - o Suggestive questions
- Leading questions (highlighted by the court)
- Non-verbal communication
- Narrative construction
- Prioritizing Adult praxis over child's voice
- Rapport Building
- Special considerations for Child Witness (CW) in Court
 - o CW relevant accommodations
 - Police interview protocol
 - o Conduct of the Court
 - Assessment of child's evidence
 - Breaks
 - Delays of adjudication
 - Judge's prior experience

- Judicial intervention
- Promise to tell the truth
- Requirements of a Child's Testimony
 - Narrative
 - Cohesive Chronology
 - Disclosure

Stigmatizing Mental Illness

Storytelling- Testimonial Process

- Entextualization
- (Lack of) Follow-up
- Gaps in stories
- Re-contextualization
- Vagueness

Testimonial Aids

- CCTV
- Issues with s.715.1 (video-recorded statement)
 - Appropriate or inappropriate questions
 - Technical difficulties
- Publication ban
- Support person
- Video- recorded evidence